TENAGA NASIONAL BHD v. MALAYSIAN RESOURCES CORPORATION BHD & OTHER CASES

HIGH COURT MALAYA, KUALA LUMPUR
ALIZA SULAIMAN J
[ORIGINATING SUMMONS NOS: WA-24C-165-08-2022, WA-24C-166-08-2022 & WA-24C-167-08-2022]
20 MARCH 2024

Abstract – *Section 37(2) and (3) of the Construction Industry Payment and Adjudication Act 2012 ('CIPAA') spell out how adjudication proceedings interact with arbitration and court cases. In the event a dispute is already under adjudication, referring it to arbitration or the court would not halt the adjudication process. The phrase 'referred concurrently' in s. 37(1) of the CIPAA further strengthens the notion that adjudication proceedings could be initiated at any stage, alongside arbitration or litigation, or even after these proceedings have begun but are still ongoing.*

CONSTRUCTION LAW: *Adjudication decision – Stay – Application for stay pending setting aside – Claimant pursued five separate adjudication proceedings arising from same construction contract after commencement of arbitration proceedings – Whether adjudication decision null and void – Whether adjudicator lacked and acted in excess of jurisdiction – Whether there was failure to comply with s. 37(1) of Construction Industry Payment and Adjudication Act 2012 – Whether adjudicator failed/neglected to apply mind in assessing claim and/or properly considered issues in dispute – Whether adjudicator arrived at finding on frolic of his own and did not represent or reflect positions taken by parties or based on evidence available – Whether there was denial of natural justice – Whether justice of case justified order to stay adjudication decision*

CONSTRUCTION LAW: *Adjudication decision – Enforcement – Application for – Claimant pursued five separate adjudication proceedings arising from same construction contract after commencement of arbitration proceedings – Whether adjudication decision null and void – Whether adjudicator lacked and acted in excess of jurisdiction – Whether there was failure to comply with s. 37(1) of Construction Industry Payment and Adjudication Act 2012 – Whether adjudicator failed/neglected to apply mind in assessing claim and/or properly consider issues in dispute – Whether adjudicator arrived at finding on frolic of his own and did not represent or reflect positions taken by parties or based on evidence available – Whether there was denial of natural justice*

WORDS & PHRASES: *'referred concurrently' – Construction Industry Payment and Adjudication Act 2012, s. 37(1) – Whether in event dispute is already under adjudication, referring it to arbitration or court would stop adjudication process – Whether adjudication proceedings could be initiated at any stage – Whether could be initiated alongside arbitration or litigation*

These applications under the Construction Industry Payment and Adjudication Act 2012 ('CIPAA') stemmed from an adjudication decision ('AD') and were heard together. The two applications were by: (i) Tenaga Nasional Bhd ('TNB'), pursuant to s. 16(1)(a) and/or (b) of the CIPAA to stay the adjudication decision pending the disposal of the stay application, the setting aside application and/or the final determination of the subject matter of the AD by way of arbitration ('stay application'); and (ii) Malaysian Resources Corporation Bhd ('MRCB'), pursuant to s. 28 of the CIPAA to enforce the AD ('enforcement application'). The events that led to these applications were as per the following. By way of a letter of acceptance ('LOA'), MRCB was appointed by TNB as the main contractor for a construction project for the sum of RM40,000,799.90. MRCB alleged that TNB failed, refused and/or neglected to make a full and fair assessment and evaluation of MRCB's claims for the works done for the project. MRCB then referred the dispute to arbitration. In fact, MRCB pursued five separate adjudication proceedings arising from the same contract after the commencement of the arbitration proceedings. The second adjudication proceeding was dismissed by the adjudicator whilst the third and fourth adjudication proceedings resulted in triple applications under ss. 15, 16 and 28 of the CIPAA, which were heard in the construction court. Similar applications were filed in respect of the first and fifth adjudication proceedings. MRCB subsequently issued the notice of adjudication to the Asian International Arbitration Centre. The adjudicator, in the AD, determined that, *inter alia*, TNB shall pay to MRCB the sum of RM675,128.95 while MRCB shall pay the costs. Hence, these applications. The issues that arose were: (i) whether the AD was null and void because the adjudicator lacked absolute jurisdiction due to MRCB's alleged failure to comply with s. 37(1) of the CIPAA by commencing the adjudication five months and 25 days after the reference to arbitration; (ii) whether the adjudicator acted in excess of jurisdiction as MRCB failed to comply with s. 5(2) of the CIPAA; (iii) whether the adjudicator failed/neglected to apply his mind in assessing the claim and/or properly consider the issues in dispute in making a finding in MRCB's favour in the sum of RM40,898.72; (iv) whether the adjudicator arrived at the finding on a frolic of his own and the same did not represent or reflect the positions taken by the parties or based on the evidence available; (v) whether there was denial of natural justice when the adjudicator refused TNB's application for leave to submit a rejoinder to address newfound averments raised for the first time in the adjudication reply in respect of the system; and (vi) in respect of category 1 claim for VO No. 1 on piles and pile caps, whether there was a denial of natural justice when the adjudicator failed and/or neglected to apply his mind in assessing this claim and/or properly consider the issues in dispute in making a finding in MRCB's favour in the sum of RM634,230.23.

Held (dismissing setting aside and stay applications; allowing enforcement application):

(1) The words 'may' and 'referred concurrently' in s. 37(1) of the CIPAA should not be read grammatically in a purely textual mode without taking into consideration the context in which these words are used. This court was duty-bound to interpret the provision of s. 37(1) of the CIPAA in a way that would promote the purpose or object underlying the CIPAA. Section 37(2) and (3) of the CIPAA provide for the correlation between adjudication, arbitration and court proceedings by making it clear that in the situation where adjudication has commenced and subsequently the dispute which is being adjudicated is referred to arbitration or the court, this shall not cause the adjudication proceeding to come to an end nor affect the same at all. Reading the words 'referred concurrently' in the context in which these words were used in s. 37(1) of the CIPAA and bearing in mind the purpose or object of the CIPAA, adjudication proceedings under the CIPAA could be initiated at any time, concurrently with arbitration or litigation, and even after arbitration or court proceedings have commenced and is still pending when the adjudication is initiated under s. 8(1) of the CIPAA. (para 53)

(2) TNB's complaint that MRCB failed to identify the cause of action including the provision in the construction contract to which the payment relates for each specific claim, was absolutely baseless. A perusal of the payment claim in Form 1 together with the 'particulars of claim' clearly showed that MRCB had provided the amount claimed, the due date for payment of the amount claimed, sufficient details to identify the cause of action including the provision in the conditions of contract ('COC') to which the payment related and the supporting documents namely, the LOA, the articles of agreement and the COC. Judging from TNB's replies in the payment response and especially the adjudication response, TNB was able to ascertain the cause of action and had understood MRCB's claims such that TNB could submit detailed defences and retorts. The payment claim contained sufficient information and details in accordance with s. 5(2) of the CIPAA and the adjudicator had not exceeded his jurisdiction in deciding the dispute between the parties. (paras 65 & 66)

(3) TNB's contention that the adjudicator failed to apply his mind in assessing the claim or to properly consider the issues in dispute was misconceived. The adjudicator dealt with the amount of interest to be awarded to MRCB in paras. 62.13, 62.14, 63 and 64 of the AD. Based on cl. 30.17 read with cl. 30.1 of the COC and the Appendix to the COC, in order to determine the amount of interest for the delayed payment claim, the adjudicator would first have to decide the date on which the simple interest based on the Maybank base lending rate + 1%

started to run. In the payment claim, IPC Nos. 5, 14, 27 and 30 were mentioned in respect of both the late issuance claim and delayed payment claim. The due date for payment of the IPC was 45 days from the issuance of the IPC. The dates of the IPC were listed in Table B. After adding 45 days to the dates of the IPC and taking into account the public holidays, the due dates for payment of the IPC could be seen in Table C. Table B and Table C were inter-related. In paras. 62.14 and 63 of the AD, the adjudicator addressed TNB's arguments that the details in Table B were incorrect, particularly the dates of the IPC and MRCB's failure to take into account gazetted holidays. However, in the second sentence in para. 63.4 of the AD, the adjudicator made a typographical error by referring to 'Table B' instead of 'Table C' as he found no fault with MRCB's calculation of interest with regards to late honouring of payment which amounted to RM40,898.72. (paras 76-80)

(4) The adjudicator's analysis and findings in paras. 62.6, 62.7 and 62.10 of the AD showed that what was foremost in the mind of the adjudicator was the contractual timelines as expressly provided, and agreed to by the parties, in the COC and the Appendix to the COC. In short, the contract prevailed. TNB's allegation that the adjudicator had gone on a frolic of his own in arriving at his findings and conclusions was simply unsubstantiated. (paras 92 & 93)

(5) There was no denial of the rules of natural justice for the following reasons, *inter alia*, (i) the CIPAA did not expressly provide that a respondent in an adjudication had a right to file a rejoinder; and (ii) the adjudicator had given the opportunity to TNB to make written submissions to justify its allegation that there were new issues which had been raised for the first time in the adjudication reply and the need for a rejoinder. MRCB had also filed its reply submission to oppose TNB's application for rejoinder. The adjudicator had duly considered these submissions. When an adjudicator complies with s. 12(2)(a) of the CIPAA and exercises his/her discretion under s. 25(a) and (j) of the CIPAA to refuse an application in an adjudication to file a rejoinder, this does not in itself amount to a breach of the second rule within the meaning of ss. 15(b) and 24(c) of the CIPAA. (para 105)

(6) The adjudicator was aware that MRCB's claim in respect of VO No. 1 was made up of the remeasurement claim and the VO claim and he decided to dismiss the former and to allow the latter. It was true that the adjudicator did not assess the remeasurement claim and the VO claim individually. It was apparent, however, upon perusal of paras. 79 to 93 of the AD that the adjudicator had addressed these very issues by considering the parties' submissions on the same. Whilst the adjudicator may not have made an express finding on each submission made by the

parties, this was not a ground to say that he had breached the rules of natural justice. TNB's allegation was nothing more than an attempt to revisit the merits of the AD. (paras 110-114)

(7) The justice of this case did not justify an order to stay the AD. MRCB acted well within its right to initiate adjudication proceedings even if it was after the commencement of arbitration. MRCB had been deprived of its rightful claims since the issuance of the certificate of practical completion. TNB should comply with the AD and allow the disputes between the parties to be conclusively resolved in the arbitration. TNB had not established that there were clear errors in the AD. (paras 124 & 125)

Case(s) referred to:

ACFM Engineering & Construction Sdn Bhd v. Esstar Vision Sdn Bhd & Another Appeal [2016] CLJU 1522; [2016] 1 LNS 1522 CA ***(refd)***

AMEC Capital Projects Ltd v. Whitefriars City Estates Ltd [2004] EWCA Civ 1418 ***(refd)***

Anas Construction Sdn Bhd v. JKP Sdn Bhd & Another Appeal [2024] 2 CLJ 665 FC ***(refd)***

Bintai Kindenko Pte Ltd v. Samsung C&T Corp [2018] 2 SLR 532 ***(refd)***

Bursa Malaysia Securities Bhd v. Mohd Afrizan Husain [2022] 4 CLJ 657 FC ***(refd)***

Cantillon Ltd v. Urvasco Ltd [2008] BLR 250 ***(refd)***

Celtex Supreme Sdn Bhd v. Mega Bina Garisan Sdn Bhd [2021] CLJU 630; [2021] 1 LNS 630 HC ***(refd)***

Cescon Engineers Sdn Bhd v. Pesat Bumi Sdn Bhd & Another Case [2022] 9 MLJ 79 HC ***(refd)***

Dato' Wira Hj Amiruddin Hj Hamzah v. Menteri Dalam Negeri & Anor [2021] CLJU 888; [2021] 1 LNS 888 HC ***(refd)***

Genbina Sdn Bhd v. Bina Puri Construction Sdn Bhd & Another Case [2019] CLJU 1980; [2019] 1 LNS 1980 HC ***(refd)***

Giatreka Sdn Bhd v. SGW Engineering Construction Sdn Bhd & Another Case [2019] CLJU 1876; [2019] 1 LNS 1876 HC ***(refd)***

Glencot Development And Design Co Ltd v. Ben Barrett & Son (Contractors) Ltd 80 Con LR 14 ***(refd)***

Guangxi Dev & Cap Sdn Bhd v. Sycal Bhd & Another Appeal [2019] 1 CLJ 592 CA ***(refd)***

Herschel Engineering Ltd v. Breen Property Ltd [2000] 70 ConLR 1 ***(refd)***

HMN Nadhir Sdn Bhd v. Jabatan Kerja Raya Malaysia & Ors [2018] CLJU 1938; [2018] 1 LNS 1938 HC ***(refd)***

Inai Kiara Sdn Bhd v. Puteri Nusantara Sdn Bhd [2019] 2 CLJ 229 CA ***(refd)***

Integral Acres Sdn Bhd v. BCEG International (M) Sdn Bhd & Other Cases [2021] CLJU 1620 HC ***(refd)***

IRDK Venture Sdn Bhd v. Econpile (M) Sdn Bhd & Another Appeal [2020] CLJU 1093; [2020] 1 LNS 1093 CA ***(refd)***

Ireka Engineering & Construction Sdn Bhd v. PWC Corporation Sdn Bhd & Other Appeals [2020] 1 CLJ 193 FC ***(refd)***

Ireka Engineering And Construction Sdn Bhd v. PWC Corporation Sdn Bhd & Another Appeal [2019] CLJU 51; [2019] 1 LNS 51 CA ***(refd)***

Jack-In Pile (M) Sdn Bhd v. Bauer (Malaysia) Sdn Bhd & Another Appeal [2020] 1 CLJ 299 FC ***(refd)***

A *Jayapadu Oil & Gas Sdn Bhd v. Chersonese Oil Sdn Bhd [2014] CLJU 972; [2014] 1 LNS 972 HC* ***(refd)***

JEKS Engineering Sdn Bhd v. PALI PTP Sdn Bhd & Another Case [2021] CLJU 1406; [2021] 1 LNS 1406 HC ***(refd)***

JKP Sdn Bhd v. Anas Construction Sdn Bhd & Another Appeal [2022] 10 CLJ 528 CA ***(refd)***

B *Kining Exeton Sdn Bhd v. Majlis Perbandaran Kuantan & Another Case [2020] CLJU 1066; [2020] 1 LNS 1066 HC* ***(refd)***

LP Capital Construction Sdn Bhd v. TKJ Builders Sdn Bhd [2020] CLJU 1464; [2020] 1 LNS 1464 HC ***(refd)***

Martego Sdn Bhd v. Arkitek Meor & Chew Sdn Bhd & Another Appeal [2019] 8 CLJ 433 FC ***(refd)***

C *Martego Sdn Bhd v. Arkitek Meor & Chew Sdn Bhd & Another Appeal [2018] 2 CLJ 163 CA* ***(refd)***

Martego Sdn Bhd v. Arkitek Meor & Chew Sdn Bhd & Another Case [2017] 1 CLJ 101 HC ***(refd)***

Maya Maju (M) Sdn Bhd v. Putrajaya Homes Sdn Bhd [2018] CLJU 1245; [2018] 1 LNS 1245 HC ***(refd)***

D *Mei He Development Sdn Bhd v. Eosh Industries Sdn Bhd & Another Case [2021] CLJU 425; [2021] 1 LNS 425 HC* ***(refd)***

MRCB Builders Sdn Bhd v. Wazam Ventures Sdn Bhd & Another Case [2020] CLJU 145; [2020] 1 LNS 145 HC ***(refd)***

Naza Engineering & Construction Sdn Bhd v. SSL Dev Sdn Bhd [2019] CLJU 2331; [2019] 1 LNS 2331 HC ***(refd)***

E *Pasukhas Sdn Bhd v. Empire Multiple Sdn Bhd & Another Case [2019] CLJU 757; [2019] 1 LNS 757 HC* ***(refd)***

Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635 HC ***(refd)***

Punj Lloyd Sdn Bhd v. Ramo Industries Sdn Bhd & Anor And Another Case [2019] 6 CLJ 250 HC ***(refd)***

F *Ranhill E & C Sdn Bhd v. Tioxide (Malaysia) Sdn Bhd & Other Cases [2015] CLJU 1435; [2015] 1 LNS 1435 HC* ***(refd)***

SKS Pavillion Sdn Bhd v. Tasoon Injection Pile Sdn Bhd [2019] 2 CLJ 704 HC ***(refd)***

Subang Skypark Sdn Bhd v. Arcradius Sdn Bhd [2015] 10 CLJ 801 HC ***(refd)***

Syed Mubarak Syed Ahmad v. Majlis Peguam Malaysia [2000] 3 CLJ 659 CA ***(refd)***

Tebin Mostapa v. Hulba-Danyal Balia & Anor [2020] 7 CLJ 561 FC ***(refd)***

G *Tecnicas Reunidas Malaysia Sdn Bhd v. Petrovietnam Engineering Consultancy JSC (PVE) & Anor And Other Cases [2021] CLJU 2227; [2021] 1 LNS 2227 HC* ***(refd)***

Tekun Nasional v. Plenitude Drive (M) Sdn Bhd & Another Appeal [2021] 10 CLJ 206 FC ***(refd)***

Terminal Perintis Sdn Bhd v. Tan Ngee Hong Construction Sdn Bhd & Another Case [2017] CLJU 177; [2017] 1 LNS 177 HC ***(refd)***

H *Tidalmarine Engineering Sdn Bhd v. Conlay Construction Sdn Bhd & Another Case [2018] 2 CLJ 376 HC* ***(refd)***

UDA Holdings Bhd v. Bisraya Construction Sdn Bhd & Anor And Another Case [2015] 5 CLJ 527 HC ***(refd)***

View Esteem Sdn Bhd v. Bina Puri Holdings Bhd [2019] 5 CLJ 479 FC ***(refd)***

I *Wabina Constructions & Engineering Sdn Bhd v. Fulloop Sdn Bhd & Other Cases [2022] CLJU 2608; [2022] 1 LNS 2608 HC* ***(refd)***

Zeta Letrik Sdn Bhd v. JAKS Sdn Bhd & Other Cases [2022] CLJU 2569; [2022] 1 LNS 2569 HC ***(refd)***

Legislation referred to:

Arbitration Act 2005, ss. 10, 23

Construction Industry Payment and Adjudication Act 2012, ss. 4, 5(2)(b), (c), 6, 7(3), 8(1), 12(2)(a), 13(a), 15(b), (d), 16(1)(a), (b), 24(c), 25(a), (j), 27(1), (3), 28(1), 29, 30, 31, 37(1), (2), (3), 36(4)

Interpretation Acts 1948 and 1967, ss. 17A, 108

Building and Construction Industry Security of Payment Act 1999 No 46 [NSW], s. 32

Building and Construction Industry Security of Payment Act 2004 [Sing], s. 34

Construction Contracts Act 2002 [NZ], ss. 26, 27

Hong Kong International Arbitration Centre Adjudication Rules [HK], rr. 81, 82, 83, 84

Housing Grants, Construction and Regeneration Act 1996 [UK], s. 108(2)(a)

Other source(s) referred to:

Lam Wai Loon & Ivan YF Loo, *Construction Adjudication in Malaysia*, 3rd edn, Sweet & Maxwell, 2022, para 22.024, p 566

Lim Chong Fong, *Law and Practice of Construction Law in Malaysia*, Sweet & Maxwell, 2021, pp 477 & 478

NS Bindra's Interpretation of Statutes, 10th edn, 2007, LexisNexis Butterworths, p 1668

[Originating Summons No: WA-24C-165-08-2022]

For the plaintiff - Mohanadass Kanagasabai, Kalashini Sandrasegaran & Thomas Shaun Mathews; M/s Mohanadass Partnership

For the defendant - Sajitha Suresh & Suria Juan; M/s Selva Mookiah & Assocs

[Originating Summons No: WA-24C-166-08-2022]

For the plaintiff - Mohanadass Kanagasabai, Kalashini Sandrasegaran & Thomas Shaun Mathews; M/s Mohanadass Partnership

For the defendant - Sajitha Suresh & Suria Juan; M/s Selva Mookiah & Assocs

[Originating Summons No: WA-24C-167-08-2022]

For the plaintiff - Sajitha Suresh & Suria Juan; M/s Selva Mookiah & Assocs

For the defendant - Mohanadass Kanagasabai, Kalashini Sandrasegaran & Thomas Shaun Mathews; M/s Mohanadass Partnership

Reported by Lina E

JUDGMENT

Aliza Sulaiman J:

Introduction

[1] These applications under the Construction Industry Payment and Adjudication Act 2012 (Act 746) ('CIPAA') were heard together with the consent of the parties. A novel issue was raised by Tenaga Nasional Berhad ('TNB') in its application in Originating Summons No. WA-24C-165-08/2022 ('OS No. 165') to set aside the adjudication decision dated 10 August 2022 ('AD') by the learned adjudicator, Mr Kamesam Shankar, pursuant to s. 15(b) and/or (d) of the CIPAA ('setting aside application') concerning the meaning of the words "referred concurrently" in sub-s. 37(1) of the CIPAA.

TNB took the position that these words should be given their plain grammatical meaning and therefore, as the adjudication was not initiated simultaneously or within a reasonable time after the commencement of arbitration, Malaysian Resources Corporation Berhad ('MRCB') has breached sub-s. 37(1) of the CIPAA and the adjudicator is deprived of his jurisdiction to adjudicate the dispute.

[2] The other two applications are by;

(i) TNB pursuant to s. 16(1)(a) and/or (b) of the CIPAA in OS No. WA-24C-166-08/2022 ('OS No. 166') to stay the AD ('stay application') pending the disposal of the stay application, the setting aside application and/or the final determination of the subject matter of the AD by way of arbitration; and

(ii) MRCB pursuant to s. 28 of the CIPAA in OS No. WA-24C-167-08/2022 ('OS No. 167') to enforce the AD ('enforcement application').

[3] After having given due consideration to the affidavit evidence and submissions by the parties, I had dismissed the setting aside application and the stay application and allowed the enforcement application.

[4] These are my full grounds of judgment for the decision.

The Cause Papers

[5] The cause papers for each application are as follows:

OS No. 165: the setting aside application:

(i) TNB's OS dated 26 August 2022 (encl. 1);

(ii) TNB's affidavit in support ('AIS') affirmed by its manager (contract and asset dispute), Nyanavellan Pillay a/l Maniam, on 26 August 2022 (encls. 2 to 25);

(iii) MRCB's affidavit in reply ('AIR') affirmed by its group chief operating officer, Kwan Joon Hoe, on 6 October 2022 (encl. 26); and

(iv) TNB's AIR affirmed by the same deponent on 1 November 2022 (encl. 27).

OS No. 166: the stay application

(i) TNB's OS dated 26 August 2022 (encl. 1);

(ii) TNB's AIS affirmed by the same deponent on 26 August 2022 (encls. 2 - 26);

(iii) MRCB's AIR affirmed by the same deponent on 6 October 2022 (encl. 27); and

(iv) TNB's AIR affirmed by the same deponent on 1 November 2022 (encl. 28).

OS No. 167: enforcement application

(i) MRCB's OS dated 29 August 2022 (encl. 1);

(ii) MRCB's AIS affirmed by the same deponent on 29 August 2022 (encl. 2);

(iii) TNB's AIR affirmed by the same deponent on 3 October 2022 (encl. 4); and

(iv) MRCB's AIR affirmed by the same deponent on 21 October 2022 (encl. 5).

Background Facts

[6] TNB is a public limited company with its registered address at Pejabat Setiausaha Syarikat, Tingkat 2, Ibu Pejabat Tenaga Nasional Berhad, No. 129, Jalan Bangsar, 59200 Kuala Lumpur. Its nature of business is basically in the generation, transmission, distribution and sales of electricity.

[7] MRCB is similarly a public limited company having its registered and business addresses at Level 33A, Menara NU 2, No. 203, Jalan Tun Sambanthan, Kuala Lumpur Sentral, 50470 Kuala Lumpur. It is principally an investment holding company and engages in construction-related activities, environmental engineering, property development and investment, and provides management services to its subsidiaries.

[8] By way of a letter of acceptance dated 15 August 2017 ('LoA'), MRCB was appointed by TNB as the main contractor for the project known as "TNB HQ Campus Development (Phase I) – The Construction And Completion Of Balai Islam and Staff Quarters At Part Of Lot 490 and Lot 6266, Jalan Bangsar, Kuala Lumpur For Tenaga Nasional Berhad" ('project') for the contract sum of RM40,000,799.90.

[9] The parties agreed to be bound by the PAM Contract 2006 (with quantities) with modification and the formal contract documents were subsequently executed by the parties.

[10] Site possession was handed to MRCB on 4 September 2017. The original completion date for the works is 3 December 2018, however, the date of practical completion is 31 July 2019. The defects liability period ended on 31 January 2023.

[11] On 26 March 2021, TNB issued the final account ('final account') in the sum of RM43,919,533, not inclusive of goods and services tax. MRCB disputed the final account and thereby issued a notice to dispute dated 30 April 2021 pursuant to cl. 30.10(b) of the conditions of contract ('CoC') within the stipulated time period of three months of the date of receipt of the final account.

[12] On 15 June 2021, MRCB submitted its Interim Payment Application No. 41 ('IPA 41') to TNB for the sum of RM47,442,296.87.

[13] TNB then issued the Certificate Of Payment No. 37 dated 9 July 2021, which was later revised on 12 August 2021 ('CP 37'), based on IPA 41 with adjustments to reflect the figures as certified in the final account.

[14] Thereafter, the consultants maintained the decision regarding the final account.

[15] MRCB alleged that TNB had failed, refused and/or neglected to make a full and fair assessment and evaluation of MRCB's claims for the works done for the project.

[16] MRCB referred the dispute to arbitration on 29 September 2021. At the time of hearing of the instant applications, 12 days of hearing had been concluded before the arbitral tribunal with the final tranche fixed for 14 to 18 August 2023.

[17] Three months and ten days later, MRCB issued a payment claim dated 7 January 2022 to TNB claiming the sum of RM3,129,946.01 consisting of claims for under-certification of variation works and interest charges for late issuance, and delayed payment, of interim payment certificates ('IPC').

[18] In fact, MRCB pursued five separate adjudication proceedings pursuant to the CIPAA arising from the same contract after the commencement of arbitration proceedings. The second adjudication proceeding was dismissed by the learned adjudicator, whilst the third and fourth adjudication proceedings resulted in the usual triple applications under ss. 15, 16 and 28 of the CIPAA, which were heard in Construction Court 1, Kuala Lumpur. Similar applications were filed in this court in respect of the first adjudication proceeding (the present applications; 'CIPAA 1') and the fifth adjudication proceeding ('CIPAA 5'; see the grounds of judgment for OS Nos. WA-24C-183-09/2022, WA-24C-184-09/2022 and WA-24C-186-09/2022).

[19] TNB issued a payment response on 21 January 2022.

[20] On 25 March 2022, MRCB issued the notice of adjudication to the Asian International Arbitration Centre.

[21] The adjudication claim was submitted by MRCB on 19 May 2022, followed by TNB's adjudication response dated 2 June 2022 and MRCB's adjudication reply dated 10 June 2022.

[22] On 10 August 2022, the adjudicator made the following determination:

Q. DETERMINATION

1. ...

2. Having carefully considered the evidence and written submissions of the Parties, I HEREBY DETERMINE AS FOLLOWS:

2.1. Respondent shall pay to the claimant the sum of RM675,128.95. This is hereby recorded as the adjudicated sum.

2.2. Respondent shall pay the adjudicated sum to claimant within 10 working days from receipt of this adjudication decision which shall henceforth be called the Due Date for Payment of the adjudicated sum.

2.3. Respondent shall pay to the claimant interest charges on the adjudicated sum at a rate of 5% per annum simple calculated from the date of receipt of the adjudication decision to the actual date of payment of the adjudicated sum.

2.4. Respondent shall pay the interest charges to claimant within 10 working days of receipt of this adjudication decision.

2.5. Claimant shall pay Costs as follows:

(a) Adjudicators Fees and AIAC Fees: RM22,500.00

(b) Party and Party Costs: RM90,000.00

2.6. Respondent shall make payment of the adjudicated sum and Interest by bank transfer to claimant's bank account. Respondent may set off costs awarded of RM112,500.00 against the adjudicated sum.

[23] The adjudicator summarised his findings in Part P of the AD which is re produced below:

Item			Section
1.	Interest claimed		
1.1	For lateness in certification of claims	Fails	61.9
1.1	For lateness in payment of certified claims	40,898.72	64
1.	Variations		
1.1	V.O. 1 Piling and Pile Caps	634,230.23	94
2.2	V.O. 2 Relocation of OSD Tank	Fails	112
2.3	V.O. 3 Pipe Jacking	Fails	118
3.	Sub total amount due	675,128.95	
4.	Costs (awarded to Respondent)		
4.1	AIAC Costs and Adjudicators Fees	(22,500.00)	127
4.3	Party and Party Costs	(90,000.00)	128
	Net Payment Due to Claimant	562,628.95	

A **OS No. 165: The Setting Aside Application**

[24] The AD is binding on the parties unless, among others, the AD is set aside on any of the grounds referred to in s. 15 of the CIPAA (see s. 13(a) of the CIPAA).

B **[25]** TNB's application to set aside the AD is premised on the following grounds:

(i) the AD is null and void because the adjudicator lacks absolute jurisdiction to hear any, or all, matters as set out in the payment claim. Specifically, the adjudicator is not seized with jurisdiction under the
C CIPAA as the alleged claims do not form part of, or fall within, the parameters of the CIPAA or the subject matter of which CIPAA has conferred jurisdiction on the adjudicator;

(ii) if the court finds that the adjudicator is seized with jurisdiction, then, that the adjudicator had:
D

(a) acted in excess of jurisdiction pursuant to s. 15(d) of the CIPAA as MRCB failed to comply with the mandatory requirements of sub-s. 5(2) of the CIPAA; and/or

(b) acted in a manner that is in breach of natural justice pursuant to
E s. 15(b) of the CIPAA.

Analysis And Decision Of The Court

First Ground: Whether The AD Is Null And Void Because The Adjudicator Lacks Absolute Jurisdiction Due To MRCB's Alleged Failure To Comply
F With Subsection 37(1) Of The CIPAA By Commencing The Adjudication Five Months And 25 Days After The Reference To Arbitration

[26] Section 37 of the CIPAA provides for the relationship between adjudication and other dispute resolution processes in these terms:

G (1) A dispute in respect of payment under a construction contract may be referred concurrently to adjudication, arbitration or the court.

(2) Subject to subsection (3), a reference to arbitration or the court in respect of a dispute which is being adjudicated shall not bring the adjudication proceedings to an end nor affect the adjudication proceedings.

H (3) An adjudication proceeding is terminated if the dispute being adjudicated is settled by agreement in writing between the parties or decided by arbitration or the court.

[27] It is trite that a challenge to an adjudicator's jurisdiction, whether on the grounds of an absolute lack of jurisdiction or an excess of jurisdiction,
I may be raised before or after an adjudication decision has been made and it is immaterial that such complaint was not raised during the adjudication

proceeding itself (see *Tecnicas Reunidas Malaysia Sdn Bhd v. Petrovietnam Engineering Consultancy JSC (PVE) & Anor And Other Cases* [2021] CLJU 2227; [2021] 1 LNS 2227; [2021] MLJU 2633 at paras. 47 to 49).

[28] In para. 3 of the payment claim, TNB reserved the right to raise relevant jurisdictional challenges at the appropriate juncture. This right was subsequently exercised in the adjudication response (see "s. 12: jurisdiction challenge", where the issue pertaining to sub-s. 37(1) of the CIPAA was submitted in paras. 155 to 161).

[29] When a jurisdictional challenge is raised during the course of an adjudication, as in this case, sub-s. 27(3) of the CIPAA allows an adjudicator to exercise his discretion to proceed with, and complete, the adjudication proceedings without prejudice to the rights of any party subsequently to apply to set aside the adjudication decision under s. 15 of the CIPAA or to oppose an application to enforce the adjudication decision under sub-s. 28(1) of the CIPAA.

[30] The adjudicator acknowledged that "… there is no *kompetenz-kompetenz* in CIPAA Adjudication, and I do not have the power to assess whether I have jurisdiction." (See sub-para. 60.1 of the AD). The adjudicator had exercised his discretion to proceed and complete the adjudication proceedings and he offered his reasons for doing so to demonstrate that his decision was not capricious and he had considered TNB's arguments (see sub-para. 60.4 of the AD).

[31] With regards to TNB's submission on absolute lack of jurisdiction, the adjudicator opined that:

> 60.7. ... There is nothing in the CIPAA that precludes a party entering into an adjudication where the matter is being already being arbitrated indeed it could be argued that doing so when the arbitration looks to be lengthy would be exactly what the CIPAA is designed to do, which is to provide quick *albeit* non-final resolution while preserving the rights of parties to seek final resolution concurrently through other means. The motives of the claimant alleged by respondent are a matter of speculation and I do not consider that argument to be relevant.

The adjudicator's views are, of course, not conclusive and this court is not bound by the same.

[32] Mr K Mohanadass submitted for TNB that s. 37 of the CIPAA envisages a situation where a party may opt to refer the dispute to arbitration or the court after initiation of adjudication proceedings under the CIPAA, without any consequential effect to the adjudication proceedings. In the current, situation where MRCB had chosen to commence arbitration first, it has thereby removed itself from the ambit of the CIPAA and the alleged claims do not form part of, or fall within, the parameters of the CIPAA or the subject matter of which the CIPAA has conferred jurisdiction on the adjudicator.

[33] It was further submitted that, based on the wordings in sub-s. 37(1) of the CIPAA and s. 23 of the Arbitration Act 2005 (Act 646) ('AA 2005') on "Commencement of arbitral proceedings" and the case authority of *Jayapadu Oil & Gas Sdn Bhd v. Chersonese Oil Sdn Bhd* [2014] CLJU 972; [2014] 1 LNS 972 at para. 40, it is the issuance of the notice to arbitrate that has to be concurrent with adjudication under the CIPAA and it must not come after the initiation of adjudication proceedings by serving the written notice of adjudication as stipulated in sub-s. 8(1) of the CIPAA.

[34] To support TNB's proposition, learned counsel relied on excerpts from the judgment of the Federal Court in *Martego Sdn Bhd v. Arkitek Meor & Chew Sdn Bhd & Another Appeal* [2019] 8 CLJ 433; [2020] 6 MLJ 224, particularly para. 50, on the intention of Parliament in enacting the CIPAA to provide an easily accessible, faster and cheaper resolution forum in the form of adjudication.

[35] It was thus contended that the application of CIPAA must be limited to adjudication proceedings initiated before or concurrent to reference to arbitration as to allow otherwise will lead to abuse of process, where a litigant opts to pursue adjudication proceedings under the CIPAA to exert litigation pressure, as opposed to addressing cash flow issues.

[36] By consciously resorting to a lengthier dispute resolution process instead of resorting to adjudication proceedings, alleviating cash flow, being the mischief that the CIPAA seeks to address, is not an issue to MRCB that has to be eliminated or resolved in the dispute between the parties.

[37] Following learned counsels' oral submissions on the first hearing date, I directed them to carry out further research on the words "may" and "concurrently" in sub-s. 37(1) of the CIPAA. In respect of the former, TNB's submissions are summarised as follows:

(i) the word "may" cannot be interpreted as being merely directive because this means ignoring the word "concurrently" in the same provision. Where MRCB did not first commence adjudication proceedings, there cannot be an unfettered discretion to commence the said proceedings as and when MRCB pleases when the CIPAA explicitly states that it should be done "concurrently". A comparison of sub-s. 37(1) of the CIPAA with s. 10 of the AA 2005 shows that, with regards to the said s. 10, there cannot be reference to arbitration and a substantive claim made in the court in respect of the same dispute at the same time;

(ii) the context in which the word "may" must be considered. In *Bursa Malaysia Securities Bhd v. Mohd Afrizan Husain* [2022] 4 CLJ 657; [2022] 3 MLJ 450 at paras. 58 to 60, the apex court held that "shall" is not always mandatory and "may" is not always directory (see too, *Maya Maju (M) Sdn Bhd v. Putrajaya Homes Sdn Bhd* [2018] CLJU 1245; [2018] 1 LNS 1245; [2018] MLJU 1629 at paras. 59 to 61); and

(iii) the word "may" is a recognition that a party could have the option of (a) first commencing adjudication as a stand-alone process; or (b) adjudication and arbitration or adjudication and court proceedings. If a party selects (c), it must exercise the choice concurrently. The word "may" must yield to the mandatory character of sub-s. 37(1) of the CIPAA.

[38] As regards the word "concurrently", reference was made to *Black's Law Dictionary*, 9th edn where, "concurrent" is defined at p. 331 as "operating at the same time; ...". In the national language version of the CIPAA, the word "serentak" is used as the equivalent to "concurrently". The definition ascribed to "serentak" in *Kamus Dewan Edisi Keempat* is "pada waktu yang sama (melalukan sesuatu dll), bersama-sama, ... menyerentakkan menyebabkan berlaku atau berjalan serentak: keserantakan perihal (keadaan) serentak ... Bersinonim dengan pada masa yang sama, serempak, sekali gus, sekali jalan ...". It was argued that as the national language version of the CIPAA is authoritative, it prevails and take precedence in the event of conflict with the English version (see *Celtex Supreme Sdn Bhd v. Mega Bina Garisan Sdn Bhd* [2021] CLJU 630; [2021] 1 LNS 630; [2021] MLJU 2061 at paras. 25 and 26).

[39] Further, the meaning of "concurrent" in the context of s. 31 of the CIPAA on the concurrent exercise of remedies was considered by the High Court in *HMN Nadhir Sdn Bhd v. Jabatan Kerja Raya Malaysia & Ors* [2018] CLJU 1938; [2018] 1 LNS 1938 at paras. 77 to 80 where it was opined, among others, that ""Concurrently" cannot be read as "sequentially" or "consecutively" after exercising its remedy under s. 28 of the CIPAA. ... the successful claimant may exercise any or all of the remedies concurrently and each of the remedy under ss. 28, 29 and 30 may be exercised singly or in combination in the enforcement of the adjudication decision. ...". Therefore, it was contended that "concurrently" under sub-s. 37(1) of the CIPAA must mean operating at the same time, "pada waktu yang sama", "bersama-sama" or "sekali jalan".

[40] Mr K Mohanadass additionally urged the court to consider the word "concurrently" together with the word preceding it and that "referred concurrently" denotes:

(i) the timing for the commencement of the applicable dispute resolution processes and that the act which sub-s. 37(1) of the CIPAA requires to be done "concurrently" is the reference. Learned counsel cited s. 7 of the CIPAA, s. 23 AA 2005, *Jayapadu Oil Gas* (*supra*, at para. 40) and *Construction Adjudication in Malaysia*, 3rd edn, Sweet & Maxwell, 2022 by Lam Wai Loon and Ivan YF Loo at para. 22.024, p. 566 to support his submission. In this sense, the focus of TNB's arguments in this case is on the words "referred concurrently" as opposed to "being

adjudicated" in sub-s. 37(2) of the CIPAA as was the case in *LP Capital Construction Sdn Bhd v. TKJ Builders Sdn Bhd* [2020] CLJU 1464; [2020] 1 LNS 1464; [2021] 7 MLJ 753;

(ii) that Parliament intended in sub-s. 37(1) of the CIPAA to legislate on a subject different from the ambit of sub-ss. 37(2) or (3) because the phrase "adjudication proceeding(s)" is used in sub-ss. 37(2) and (3), but not in sub-s. 37(1).

Based on the comparative study undertaken by learned counsel and his diligent associates for TNB (see Appendix 1 to TNB's supplementary submission in encl. 41) on s. 108 of the Housing Grants, Construction and Regeneration Act 1996 (UK), s. 34 of the Building and Construction Industry Security of Payment Act 2004 (Singapore), s. 32 of the Building and Construction Industry Security of Payment Act 1999 No 46 (New South Wales) (as an example of the provision governing the relationship between other dispute resolution processes and adjudication in Australia), ss. 26 and 27 of the Construction Contracts Act 2002 (New Zealand) and rr. 81 to 84 of the Hong Kong International Arbitration Centre Adjudication Rules, it was highlighted that:

(a) the relationship between adjudication and arbitration or adjudication and court in other jurisdictions is not governed by provisions similar to s. 37 of the CIPAA and as such, sub-s. 37(1) of the CIPAA is unique and ultimately has to be construed on its own terms (see *UDA Holdings Bhd v. Bisraya Construction Sdn Bhd & Anor And Another Case* [2015] 5 CLJ 527 at paras. 149 to 152);

(b) the issue as to whether adjudication proceedings can be commenced after arbitration has not been decided in these jurisdictions except for the UK, where in *Herschel Engineering Ltd v. Breen Property Ltd* [2000] 70 ConLR 1, Dyson J held the view that the provision on s. 108(2)(a) of the 1996 Act must be given their plain and natural meaning *ie*, a party may refer a dispute to an adjudicator at any time. Hence, by starting court proceedings, the claimant had not waived his right to refer the dispute to adjudication. The legal principle that a party should not make the same claim against his opponent in two different courts or in litigation and arbitration does not apply in the context of arbitration and adjudication because the decision of an adjudicator is not final. Moreover, if the Legislature had intended that a party should not be able to refer a dispute to adjudication once litigation or arbitrations proceeding had commenced, it would have expressly said so; and

(c) although the Malaysian drafters were guided by the New Zealand statute in framing s. 37 of the CIPAA, a notable difference is that sub-s. 26(1) of the New Zealand Act provides that "To avoid doubt,

nothing in this Part prevents the parties to a construction contract from submitting a dispute to another dispute resolution procedure (for example, to a court or tribunal, or to mediation), whether or not the proceedings for the other dispute resolution procedure take place concurrently with an adjudication." *Ie*, the proceedings, as opposed to commencement, may be concurrent. In contrast, the words "referred concurrently" in sub-s. 37(1) of the CIPAA show that, where both adjudication and arbitration proceedings or adjudication and court proceedings are commenced, the act of commencement must be done concurrently (see para. 76 in *Martego's* case (*supra*)); and

(iii) that, on the true construction and on plain, ordinary and grammatical reading of s. 37 of the CIPAA (see *Tebin Mostapa v. Hulba-Danyal Balia & Anor* [2020] 7 CLJ 561; [2020] 4 MLJ 721 at para. 40, p. 744), in the situation where adjudication is not commenced first, the commencement of adjudication after arbitration proceedings or a civil suit must be concurrent or within a reasonable time of each other.

Since no specific time interval is provided in the CIPAA within which the commencement of adjudication is to take place from the commencement of arbitration proceedings or a civil suit, s. 108 of the Interpretation Acts 1948 and 1967 (Act 388) applies and the right to commence arbitration and adjudication proceedings must be within reasonable time or "convenient speed" of each other (see *Dato' Wira Hj Amiruddin Hj Hamzah v. Menteri Dalam Negeri & Anor* [2021] CLJU 888 [2021] 1 LNS 888; [2021] 12 MLJ 871 at paras. 23 to 29, pp. 882 to 884). What is "reasonable" in given circumstances must be measured against the statutory dictate that the commencement of the two proceedings must take place "concurrently", underscoring the intention of Parliament that any interval between the two proceedings is extremely short.

In the instant case, MRCB did not commence adjudication concurrently or within a reasonable time of the arbitration proceedings and no explanation was provided with regards to the commencement of adjudication almost six months after arbitration as well as the launching of five adjudication claims based on the same disputes referred to a single arbitration.

[41] Emphasis was also laid on policy considerations in that the scheme of the CIPAA, which is intended to address cash flow problems to obtain a decision of temporary finality, which may subsequently be finally determined through arbitration or court, should be upheld. It was vigorously submitted that the commencement of adjudication proceedings by MRCB in the circumstances of this case is an abuse of the CIPAA process as TNB is pressured and oppressed by proceedings under the CIPAA which are time-consuming, have very stringent deadlines, costly and diverts attention from

the main disputes before the arbitral tribunal. By commencing arbitration and then statutory adjudication some months later, cashflow is certainly not an issue to MRCB and hence, there is no mischief for the CIPAA to address. TNB implored the court to accept its contentions on the interpretation of sub-s. 37(1) of the CIPAA by not permitting claims under the CIPAA to be made after arbitration or court proceedings have commenced.

[42] TNB's argument that MRCB is not an impecunious construction contractor, who is in dire need of cashflow, can be immediately dispelled for the reason as submitted by MRCB *ie*, that the CIPAA does not discriminate. In any event, the project was practically completed on 31 July 2019 and MRCB's claims have remain unpaid.

[43] MRCB averred that it was obliged to commence an arbitration within three months from the date when MRCB was informed that the project consultants refused to amend the final account (*ie*, 16 July 2021) in compliance with cl. 30.10(b) of the CoC or forever lose its right to do so. The said provision reads:

> If either party disputes the final account, the party disputing the final account shall by written notice to the other party (with copies to the Architect and Quantity Surveyor) set out any disagreement complete with particulars within three (3) Months of the date of receipt of the final account from the Architect or Quantity Surveyor. The Architect or Quantity Surveyor within three (3) Months from the date of receipt of the grounds of dispute shall either amend or not amend the final account. Any party disagreeing with the amended final account or decision not to amend then final account shall refer the dispute to arbitration under Clause 34.0 within three (3) Months from the date of receipt of the amended final account or decision not to amend the final account. Failure to refer the dispute to arbitration within the stipulated time, the final account or amended final account shall deem to be conclusive and agreed by the parties.

[44] In submitting on the meaning to be attributed to the word "concurrently" in sub-s. 37(1) of the CIPAA, learned counsels for MRCB drew a parallel with the concept of imprisonment sentences to run concurrently as opposed to consecutively in criminal cases and therefore, the plain and ordinary meaning of the word would be "at the same time". However, MRCB took the firm position that this interpretation cannot stand as it would lead to absurdity and cause an unpaid party to lose its right to adjudication if the available remedies are not strictly commenced at the same time.

[45] The jurisdictional complaint under the first ground is an absolute lack of jurisdiction and it is well-recognised that such complaint may be taken up at any time, although in this case, as the AD has been made, TNB rightfully sought for an order that the AD be declared as null and void (see *View Esteem*

Sdn Bhd v. Bina Puri Holdings Bhd [2019] 5 CLJ 479 at paras. 12 to 19, pp. 494 to 496 and *Construction Adjudication in Malaysia* (*supra*), at paras. 11.030 to 11.032, p. 297). A

[46] I have carefully considered TNB's submissions alongside MRCB's responses but, with respect, I am not prepared to interpret sub-s. 37(1) of the CIPAA in the manner as advocated by TNB. My reasons are elaborated below. B

[47] I begin with the illuminating excerpt from the judgment of the Federal Court as delivered by Vernon Ong FCJ in the case, which was cited by TNB, namely, *Tebin Mostapa* (*supra*). The rules of statutory interpretation were succinctly described at pp. 734 to 735 of the judgment as follows: C

> [28] At common law, there are three judicial rules of statutory interpretation. They are: (i) the literal rule; (ii) the golden rule; and (iii) the mischief rule. *According to the literal rule, the statute is read by its natural and ordinary, meaning of the words, the assumption being that Parliament has said what it means. However, this can lead to absurd outcomes or in other instances the literal interpretation may appear to be contrary to Parliament's intentions. If the literal rule yields an absurd outcome, the court will apply the golden rule. When the usual meaning of a word causes unjust outcomes, the courts interpret the offending word to reduce the absurdity*. The golden rule is applied narrowly where there is more than one meaning of a word, the court may chose the meaning that avoids an absurdity. Where there is only one meaning but the literal rule would lead to an absurd or repugnant situation, the court will modify the meaning of the words or phrases to avoid the absurd result. If the literal and golden rules have failed to achieve a just result, the court will apply the mischief rule to ascertain the wrong (or mischief) that Parliament was trying to remedy and interpret the statute in accordance with Parliament's intention; in essence the purposive approach to statutory interpretation. This approach requires the court to examine the object of the statute in question and to construe the doubtful phrases or words in accordance with that purpose. D E F
>
> (emphasis added)

[48] The court then briefly discussed six recent pronouncements of the apex court on the application of the settled common law rules of statutory interpretation (see para. 29 at pp. 735 to 740) before providing a valuable summary in the following words: G

> [30] In our opinion, the rules governing statutory interpretation may be summarised as follows. First, *in construing a statute effect must be given to the object and intent of the Legislature in enacting the statute. Accordingly, the duty of the court is limited to interpreting the words used by the Legislature and to give effect to the words used by it*. The court will not read words into a statute unless clear reason for it is to be found in the statute itself. Therefore, in construing any statute, the court will look at the words in the statute and apply the plain and ordinary meaning of the words in the statute. Second, if, however the words employed are not clear, then the court may adopt the purposive approach in construing the meaning of the words used. H I

> *Section 17A of the Interpretation Acts 1948 and 1967 provides for a purposive approach in the interpretation of statutes*. Therefore, where the words of a statute are unambiguous, plain and clear, they must be given their natural and ordinary meaning. The statute should be construed as a whole and the words used in a section must be given their plain grammatical meaning. It is not the province of the court to add or subtract any word; the duty of the court is limited to interpreting the words used by the legislature and it has no power to fill in the gaps disclosed. Even if the words in a statute may be ambiguous, the power and duty of the court 'to travel outside them on a voyage of discovery are strictly limited'. Third, *the relevant provisions of an enactment must be read in accordance with the legislative purpose and applies especially where the literal meaning is clear and reflects the purposes of the enactment. This is done by reference to the words used in the provision; where it becomes necessary to consider every word in each section and give its widest significance. An interpretation which would advance the object and purpose of the enactment must be the prime consideration of the court, so as to give full meaning and effect to it in the achievement to the declared objective*. As such, in taking a purposive approach, the court is prepared to look at much extraneous materials that bears on the background against which the legislation was enacted. It follows that *a statute has to be read in the correct context* and that as such the court is permitted to read additional words into a statutory provision where clear reasons for doing so are to be found in the statute itself.
>
> (emphasis added)

[49] *Tebin Mostapa* was referred to in *Bursa Malaysia Securities* (*supra*) when Nallini Pathmanathan FCJ, in delivering the decision of the court, said at p. 470 that:

> **[50] Malaysian law requires that the interpretation of an Act be undertaken with the purpose and object of the Actin mind**. Section 17A of the Interpretation Acts provides as follows:
>
> > In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.
>
> ...
>
> **[51] It is clear from the wording of s. 17A that any reading which is purely textual, as opposed to contextual, is to be rejected**.
>
> (emphasis added)

[50] Earlier in the judgment, Her Ladyship had identified one of the issues for determination was whether the provision in question in that case, namely r. 16.11(2) of the ACE (Access, Certainty, Efficiency) Market Listing Requirements ('AMLR'), should be read or interpreted grammatically, and *in vacuo*, without consideration for context *ie*, the surrounding words and purpose and object of the AMLR and the Capital Markets and Services Act 2007 (Act 671) (see para. 48, p. 470).

[51] TNB contended that MRCB did not give any reasons to favour the purposive approach to statutory interpretation over the literal approach. However, it is clear from MRCB's additional submission (encl. 39) that it relied on *Bursa Malaysia Securities* and s. 17A of Act 388 for the proposition that, in order to answer the question as to how the words "may" and "referred concurrently" are to be construed, the court must consider sub-s. 37(1) in the context of the CIPAA and that it is the duty of the court to construe the said provision to ascertain the intention of the Legislature by analysing the true meaning of the provision in the context of a holistic reading of the CIPAA. MRCB's counsel submitted that the CIPAA must be interpreted in a manner that will further and promote the purpose of the Act as found in the long title, namely to "... facilitate regular and timely payment, to provide a mechanism for speedy dispute resolution through adjudication, to provide remedies for the recovery of payment in the construction industry and to provide for connected and incidental matters."

[52] The need to comply with s. 17A of Act 388 was emphasised in the following passage from *Bursa Malaysia Securities*:

> [77] Regrettably neither the High Court nor the Court of Appeal undertook any sort of consideration of the purpose nor principles set out in the rules in order to ascertain the meaning to be accorded to the word 'shall" in r 16.11(2). This was explained on the basis that as there was no ambiguity there was no necessity to consider anything other than the express words used. This was understood to amount to a literal reading of the relevant rule falling for consideration. In so doing, the Court of Appeal misunderstood the function and purpose of the literal rule of statutory construction. *Reading the express words set out in a statute in vacuo, and without taking into consideration the context in which those words are utilised, does not amount to a literal approach to statutory interpretation. That is a grammatical application of the meaning of words. Section 17A of the Interpretation Acts requires that the purpose and object of an Act and other instruments made under an Act must be undertaken when construing a statute. As s. 17A is a statutory provision, it must be complied with*. Therefore, both the High Court and the Court of Appeal, in failing to undertake this task as provided for in s. 17A, committed an error of law.
>
> (emphasis added)

[53] Applying the rules of statutory interpretation as explicated above to the present case, I find as follows:

(i) the words "may" and "referred concurrently" in sub-s. 37(1) of the CIPAA should not be read grammatically in a purely textual mode without taking into consideration the context in which these words are used. This court is duty-bound to interpret the provision of sub-s. 37(1) of the CIPAA in a way that would promote the purpose or object underlying the CIPAA as discussed by the highest court of the land

(see *Jack-In Pile (M) Sdn Bhd v. Bauer (Malaysia) Sdn Bhd & Another Appeal* [2020] 1 CLJ 299; [2020] 1 MLJ 174; *Ireka Engineering & Construction Sdn Bhd v. PWC Corporation Sdn Bhd & Other Appeals* [2020] 1 CLJ 193; [2020] 1 MLJ 311 and *Martego* (*supra*, at paras. 46 to 55). See too, *IRDK Venture Sdn Bhd v. Econpile (M) Sdn Bhd & Another Appeal* [2020] CLJU 1093; [2020] 1 LNS 1093; [2020] MLJU 939).

(ii) the judgment in *LP Capital Construction* (*supra*) was delivered on 14 September 2020 whilst the decision of the Federal Court in *Bursa Malaysia Securities* was pronounced later, on 31 March 2022. The Kuching High Court made no reference to s. 17A of Act 388. The High Court applied the legal principles in *Syed Mubarak Syed Ahmad v. Majlis Peguam Malaysia* [2000] 3 CLJ 659; [2000] 4 MLJ 167 and in all levels of the court decisions in *Martego*'s case (*supra*, *Martego Sdn Bhd v. Arkitek Meor & Chew Sdn Bhd & Another Appeal* [2018] 2 CLJ 163; [2018] 4 MLJ 496 and *Martego Sdn Bhd v. Arkitek Meor & Chew Sdn Bhd & Another Case* [2017] 1 CLJ 101; [2016] MLJU 1051) to arrive at a conclusion that the words "being adjudicated" do not literally mean that there must be an existing adjudication before the parties can turn to litigation (see paras. 9 to 17 at pp. 762 to 764). The court rejected the plaintiff's contention for the literal rule to be applied in interpreting the said words as it would not advance the aim of the CIPAA:

> ... Adjudication under CIPAA was never designed to be in conflict with arbitration and litigation and it may be activated at anytime when there is a valid payment claim under a construction contract. Premised on that, the question of which should prevail over the other does not rise at all. Statutory adjudication does not require agreement of parties to commence the process and it prevails over any contractual agreements to the contrary between parties. Statutory adjudications stands alone and aloof of all other alternative modes of dispute resolution like arbitration or litigation. Therefore, the plaintiff's contention on this issue is clearly devoid of merits which run foul to the principle of law laid down in the case of *Martego*.

It can thus be said that the learned Judicial Commissioner (as Her Ladyship then was) had, in effect, applied the contextual approach rather than a purely textual approach in interpreting the words "being adjudicated" in sub-s. 37(2) of the CIPAA. The provision itself contains no limitation that adjudication can only be commenced before arbitration or litigation is pursued.

In my opinion, sub-ss. 37(2) and (3) of the CIPAA provide for the correlation between adjudication, arbitration and court proceedings by making it clear that, in the situation where adjudication has commenced

and subsequently the dispute which is being adjudicated is referred to arbitration or the court, this shall not cause the adjudication proceeding to come to an end nor affect the same at all. Further, if the dispute being adjudicated is settled by a written agreement between the parties or decided by arbitration or the court, this would result in the adjudication proceeding being terminated.

I would subscribe to the view that just because the words "being adjudicated" appear in sub-s. 37(2) of the CIPAA does not, *ipso facto*, mean that the right to statutory adjudication under the CIPAA is ousted and becomes unavailable, where a claimant has filed a suit against the respondent in the court premised on the same claim before the commencement of the adjudication proceeding.

(iii) by TNB's own submission that the word "may" in sub-s. 37(1) of the CIPAA indicates that a party has a choice of either initiating adjudication on its own or adjudication and arbitration or adjudication and court proceedings, and the authorities cited by MRCB that the word "may" is enabling and permissive in nature (see, among others, *NS Bindra's Interpretation of Statutes*, 10th edn, 2007, LexisNexis Butterworths at p. 1668), I am persuaded by MRCB's submission that the word "may" in sub-s. 37(1) of the CIPAA is permissive *ie*, adjudication can be pursued concurrently with arbitration or the court.

(iv) TNB has not established that there is conflict between the words "serentak" and "concurrently" as used in the national language and English texts of the CIPAA, respectively. In my opinion, no such conflict exists.

(v) adjudication proceedings are initiated by a claimant by serving a written notice of adjudication to the respondent (see sub-s. 8(1) of the CIPAA), while arbitral proceedings commence on the date on which a request in writing for the dispute to be referred to arbitration is received by the respondent (see s. 23 of the AA 2005). If TNB's contention is accepted, this means that the service of the notice of adjudication and receipt of the notice of arbitration must fall on the same date or be within reasonable time or "convenient speed" of each other.

In the light of the purpose and object of the CIPAA, which is to alleviate cash flow problems in the construction industry such that an unpaid party can be paid speedily for the work which it has carried out and thus giving temporary finality to payment claims, and taking into consideration the strict timelines which must be observed under the statutory adjudication regime such that once adjudication is initiated, the adjudication decision will be delivered before the completion of any arbitration or court proceedings which have been commenced concurrently with the adjudication proceedings, I am unable to agree

with TNB's proposition that the words "referred concurrently" in sub-s. 37(1) of the CIPAA should be interpreted in a literal sense such that where adjudication is not initiated first, the commencement of adjudication and arbitration or adjudication and court proceedings must be done simultaneously or "at the same time"/"sekali jalan".

The Federal Court in *Martego* (*supra*, at para. 76) held that adjudication and arbitration are not mutually exclusive to each other. Notably, the Court of Appeal in the same case (*supra,* at para. 48) said that:

> ... **The CIPAA 2012 allows parties to take their grievances to the High Court prior to the adjudication process**, concurrent with the adjudication application and even after the adjudication process notwithstanding the adjudication decision to determine the very construction dispute before the adjudicator. Reference to an arbitration tribunal is also available to the parties and the factual findings of the adjudicator are not binding on either the High Court or the arbitration tribunal. This is specifically provided for in s. 37 of the CIPAA 2023.
>
> (emphasis added)

As submitted by MRCB, if adjudication can follow litigation, the same rationale would apply to arbitration (see too, *Ranhill E & C Sdn Bhd v. Tioxide (Malaysia) Sdn Bhd & Other Cases* [2015] CLJU 1435; [2015] 1 LNS 1435; [2015] MLJU 1873 at para. 38).

Therefore, reading the words "referred concurrently" in the context in which these words are used in sub-s. 37(1) of the CIPAA and bearing in mind the purpose or object of the CIPAA, adjudication proceedings under the CIPAA can be initiated at any time, concurrently with arbitration or litigation, and even after arbitration or court proceedings have commenced and is still pending when the adjudication is initiated under sub-s. 8(1) of the CIPAA.

If Parliament had intended that adjudication and arbitration or adjudication and court litigation must be commenced at the same time in the strict sense of the word, and that an unpaid party loses its right to refer the dispute to adjudication once arbitration or litigation has commenced, where such commencement is not done simultaneously, clear words to this effect would have been inserted in the CIPAA as was done in sub-s. 7(3) of the CIPAA. That provision expressly provides that reference to adjudication is subject to, among others, the Limitation Act 1953 (Act 254). Hence, the right of an unpaid party to refer the dispute to adjudication may be barred by reason of statutory limitation.

TNB's contention that the commencement of adjudication must at least be within a reasonable time or "convenient speed" of the commencement of arbitration would, to my mind, only invite protracted arguments in ascertaining what constitutes "reasonable time" in each

case. This would also cause uncertainties in the law when there is nothing in s. 37 of the CIPAA which justifies the application of s. 108 of Act 388 in the first place.

[54] In view of the foregoing reasons, the first ground to set aside the AD was rejected.

Second Ground: Whether The Adjudicator Acted In Excess Of Jurisdiction As MRCB Failed To Comply With Subsection 5(2) Of The CIPAA

[55] According to sub-s. 27(1) of the CIPAA, the adjudicator's jurisdiction in relation to any dispute is limited to the matter referred to adjudication by the parties pursuant to ss. 5 and 6.

[56] Section 5 of the CIPAA reads as follows:

Payment claim

5. (1) An unpaid party may serve a payment claim on a nonpaying party for payment pursuant to a construction contract.

(2) The payment claim shall be in writing and shall include:

(a) the amount claimed and due date for payment of the amount claimed;

(b) details to identify the cause of action including the provision in the construction contract to which the payment relates;

(c) description of the work or services to which the payment relates; and

(d) a statement that it is made under this Act.

[57] The word "payment" is defined under s. 4 of the CIPAA to mean "a payment for work done or services rendered under the express terms of a construction contract".

[58] The Federal Court in *View Esteem* (*supra*) held, among others, that sub-s. 27(1) of the CIPAA refers to the "identification of the cause of action" in relation to the construction contract as required under para. 5(2)(b) of the CIPAA or, in other words, the subject matter of the claim under s. 5 of the CIPAA, which is the cause of action identified by the claimant by reference to the applicable clause in the construction contract (*supra*, at paras. 55 and 56, pp. 503 and 504).

[59] In the payment claim, MRCB advanced the following two categories of claim:

(i) category 1: Under-certification of Interim Payment Claim No. 41

(a) variation order ('VO') No. 1 on "Piles and Pilecaps: PMI- Plc-003, PMI-P1c-009, PMI-P1c-011, PMI-P1c-013 and PMI-P1c-017 & Remeasurement of Provisional Quantities for Piles and Pilecaps";

(b) VO No. 2 on "On Site Fetention (OSD) at Jalan Faraday: PMI-Plc-011, PMI-Plc-013 and PMI-Plc-017"; and

(c) VO No. 3 on "Pipe Jacking: PMI-Plc-011, PMI-Plc-013 and PMI-Plc-017".

(ii) category 2: Interest charges

(a) for late issuance of IPC Nos. 5, 12, 14, 17, 20, 22, 23, 27, 28, 30, 31 and 32 ('late issuance claim"); and

(b) delayed payment of IPC Nos. 1, 4, 5, 9, 10, 11R, 14, 16, 18, 24, 25, 26, 27, 29 and 30 ('delayed payment claim').

[60] The category 2 claims were further explained in para. 24 of the adjudication claim whereby:

(i) the late issuance claim arose due to TNB's delays in issuing the interim certificates, which is 21 days from the date of issuance of MRCB's progress claims by virtue of cl. 30.1 of the CoC; and

(ii) the delayed payment claim is due to TNB's delays in honouring payment of the IPC, which is 45 days from the issuance of the IPC by virtue of the Appendix to the CoC at preliminary p. 1/45.

[61] In the payment response, TNB had raised the issue that the payment claim does not satisfy the requirements of the CIPAA, and this was elaborated in para. 162 of the adjudication response.

[62] The adjudicator summed up TNB's arguments as that MRCB has not identified the amount claimed, due date for payment and cause of action for each of the claims made. The adjudicator stated that he was not compelled by TNB's submissions and that, upon reading the payment claim, the elements have been addressed by MRCB (see sub-paras. 60.8 and 60.9 of the AD).

[63] In this court, TNB submitted that, in view of the alleged non-compliance, the payment claim is thus rendered as invalid. TNB relied on the case authorities of *JKP Sdn Bhd v. Anas Construction Sdn Bhd & Another Appeal* [2022] 10 CLJ 528; [2022] 6 MLJ 503 at paras. 17 to 32 (at the time of writing of these grounds of judgment, the Federal Court has affirmed the decision of the Court of Appeal by a majority judgment, see *Anas Construction Sdn Bhd v. JKP Sdn Bhd & Another Appeal* [2024] 2 CLJ 665; [2024] MLJU 53); *SKS Pavillion Sdn Bhd v. Tasoon Injection Pile Sdn Bhd* [2019] 2 CLJ 704; [2019] 9 MLJ 396 at paras. 12 to 15 and *Giatreka Sdn Bhd v. SGW Engineering Construction Sdn Bhd & Another Case* [2019] CLJU 1876; [2019] 1 LNS 1876; [2019] MLJU 1477 at para. 36 to support the submission that, the adjudicator has no jurisdiction to adjudicate on the claims in an invalid payment claim and therefore, the adjudicator has acted in excess of his jurisdiction.

[64] The type of jurisdiction which falls for consideration in this case is competency jurisdiction (see *Terminal Perintis Sdn Bhd v. Tan Ngee Hong Construction Sdn Bhd & Another Case* [2017] CLJU 177; [2017] 1 LNS 177; [2017] MLJU 242 at para. 71 and *View Esteem* (*supra*, at para. 17, p. 495)).

[65] TNB's specific contentions that MRCB has not complied with the requirements under sub-s. 5(2) of the CIPAA and my findings are set out below:

(i) in respect of the category 1 claims:

MRCB failed to accurately reflect the description of the work or services to which the payment relates. Category 1 claims are described in the payment claim as arising from VO Nos. 1, 2 and 3. It was submitted that the characterisation of the category 1 claims as arising from VO Nos. 1, 2 and 3 is wrong because VO No. 1 is for "Revised Drawings For Conventional RWDP and Additional Syphonic System", VO No. 2 is for "Change Carpet Design and Quality" and VO No. 3 is for works identified as "Gas Fetection System". Based on s. 2 of the final account for the project in March 2021 on "Variation Works", these VOs have been certified and there is no dispute between the parties in this regard.

in sub-para. 51(b) of its AIR, MRCB averred that its claims in the adjudication proceedings were numbered with its own numbering for the purpose of simplifying and ordering its claims according to numbers 1 to 3 and that TNB is not prejudiced by this. Ms Sajitha submitted for MRCB that this is merely a matter of formatting and numbering and cannot be a valid reason to set aside the AD on the grounds that the adjudicator had acted in excess of jurisdiction. I agree.

Apart from stating the VO number, the payment claim had also stated the description of the variation works and the relevant PMIs for each of the VO. As there are five PMIs in respect of VO No. 1 and three PMIs for VO No. 2 and VO No. 3, respectively, MRCB had chosen to identify the variation works by numbering them as per the payment claim. Judging from paras. 76 to 136 in the adjudication response, TNB understood the premise of MRCB's category 1 claims and was able to put across its case on these claims. The adjudicator had accordingly deliberated on the claims which were submitted to him for determination by way of the payment claim in paras. 85 to 118 of the AD where he ultimately allowed MRCB's claim for RM634,230.23 for VO No. 1 piling and pile caps and rejected the claims for VO No. 2 and VO No. 3.

I am satisfied that MRCB has fulfilled the requirements under sub-s. 5(2) of the CIPAA and in particular, the description of the work to which the payment relates under para. (c) of the sub-section.

(ii) in respect of the category 2 claims:

MRCB failed to accurately state the due date for payment in relation to the delayed payment claim. Instead, MRCB identified various due dates by assigning specific due dates for each IPC under the delayed payment claim as the due date for payment. TNB argued that this cannot be correct because the delayed payment claim is said to have arisen from IPA 41, hence, the correct due date should be 28 September 2021.

Further, TNB submitted that MRCB did not provide any explanation as to why the various due dates were listed in the payment claim as opposed to the due date for payment under IPA 41. MRCB also did not state that it was relying on s. 36 of the CIPAA wherein sub-s. 36(4) stipulates that the due date for payment in relation to progress payments is 30 calendar days from the receipt of the invoice.

It was additionally argued that MRCB cannot sustain a claim for the delayed payment claim independently of IPA 41 under s. 5 CIPAA because there had been no separate/specific payment submission, submitted by MRCB to TNB in relation to the same, as provided under the contract. Moreover, interest charges are not work done or services rendered under any express terms of the contract.

in my view, there is no merit to TNB's submissions because MRCB has met all the requirements under sub-s. 5(2) of the CIPAA. The payment claim clearly shows that, apart from the due date for payment of the IPC, MRCB had also stated that the due date for payment of interest charges for the delayed payment of the 15 IPC concerned is "(45 days from the issuance of the interim payment certificate as per Appendix to the conditions of contract at prelims p. 1/45)".

Among the "relevant contract provision" mentioned in the payment claim is cl. 30.1 of the CoC, which reads:

> Payment application and issuance of Architect's certificate
>
> The Contractor shall submit a payment application at the Interim Claim Interval stated in the Appendix with complete details and particulars as required by the Architect and Quantity Surveyor, to enable them to consider and ascertain the amount to be included in an Interim Certificate. Upon receipt of the Contractor's details and particulars, the Architect after having received the payment valuation from the Quantity Surveyor shall, within twenty one (21) Days from the date of receipt of the Contractor's application, issue an Interim Certificate to the Employer with a copy to the Contractor, and the Employer shall thereafter pay the amount certified to the Contractor within the Period of Honouring Certificates. Any failure by the Contractor to submit a payment

> application shall be deemed to be a waiver of his contractual entitlement for that Interim Certificate, and the Architect may or may not issue an Interim Certificate under the circumstances. After the issuance of the Certificate of Practical Completion, Interim Certificates shall be issued as and when further amounts are ascertained by the Architect and Quantity Surveyor as payable to the Contractor by the Employer.

The "period of honouring certificates" is defined in art. 7(ap) of the articles of agreement ('AoA') to mean "the period for honouring certificates stated in the Appendix under cl. 30.1".

At p. 1/45 of "E2: Bill No. 1: preliminaries", the "period of honouring certificates" is provided as 45 days. Clause 30.1 of the CoC clearly imposes an obligation on TNB to pay MRCB the amount certified for work done within 45 days from the date of issuance of the IPC.

(iii) in respect of the category 1 and category 2 claims:

MRCB failed to identify the cause of action, including the provision in the construction contract to which the payment relates for each specific claim. TNB contended that a reasonable person reviewing the payment claim will not be able to ascertain the cause of action and this point was raised in the adjudication response (see para. 162).

Category 1 and 2 claims are said to have arisen from IPA 41. A review of the covering letter for the payment claim dated 7 January 2022 ('covering letter') shows that MRCB had linked IPA 41 with the final account and CP37. TNB's counsel submitted that the covering letter is not the payment claim. Form 1 is the payment claim and is the only document which is relevant for the purposes of ascertaining whether MRCB has complied with the requirements under sub-s. 5(2) CIPAA.

I have rejected MRCB's invitation for me to read the payment claim together with the contents of the covering letter in deciding whether s. 5 of the CIPAA has been fulfilled. Paragraphs 15 and 16 of the covering letter state that:

> 15. Therefore, we hereby issue this payment claim for the sum of **RM3.129.946.01 (exclusive of interest)** against you pursuant to **Section 5 CIPAA 2012**. The said payment claim with its relevant attachments is enclosed herein for your reference.
>
> 16. Take note that this payment claim is only confined to issues arising from the final account, Interim Payment Application No. 41 and the corresponding Certificate of Payment No. 37 (Revised) that are listed at para. 12 above and shall in no way prejudice our rights to refer further and other claims to adjudication.
>
> (emphasis added)

It is apparent from the above-quoted excerpt that MRCB has referred to the "payment claim" as the document in Form 1 which was enclosed to the letter. Based on the applications under the CIPAA which have been filed in this court, some unpaid parties have served their payment claims on the non-paying parties in the form of a letter, whilst others have opted to use "Form 1 payment claim" in Schedule I, Part B Procedure of the "Asian International Arbitration Centre Rules & Procedure". In footnote 1 of Form 1, it is written that "... these forms contained in Schedule 1 are suggested forms only, intended merely to highlight the matters and procedures which the relevant parties a have to consider when taking the steps in question.".

Since MRCB has chosen to use the format in the said Form 1 and, by its own words in the covering letter, has treated the payment claim as being the one in Form 1 and attached to the covering letter, the issue as to whether MRCB has complied with the requirements of s. 5 of the CIPAA must therefore be answered within the four corners of the payment claim in Form 1 dated 7 January 2022, without any reference to the covering letter.

In my view, TNB's complaint that MRCB has failed to identify the cause of action, including the provision in the construction contract to which the payment relates for each specific claim, is absolutely baseless. A perusal of the payment claim in Form 1 together with the "Particulars Of Claim" clearly shows that MRCB has provided the amount claimed, the due date for payment of the amount claimed, sufficient details to identify the cause of action, including the provision in the CoC to which the payment relates and the supporting documents namely, the LoA, AoA and CoC. Judging from TNB's replies in the payment response and especially the adjudication response, TNB was able to ascertain the cause of action and understood MRCB's claims such that TNB could submit detailed defences and retorts.

[66] In sum, the payment claim contains sufficient information and details in accordance with sub-s. 5(2) of the CIPAA and the adjudicator has not exceeded his jurisdiction in deciding the dispute between the parties.

Third Ground: Whether There Is A Denial Of Natural Justice For The Reasons As Proffered By TNB

[67] The function of this court in considering the third ground of TNB's challenge against the AD is to look at the manner in which the adjudicator had conducted the adjudication and whether he had accorded procedural fairness to the parties or that, based on the circumstances in this case, a breach of the right to prior notice and an effective opportunity to make

representation or to be heard before the AD is made has occurred (see *Ireka Engineering And Construction Sdn Bhd v. PWC Corporation Sdn Bhd & Another Appeal* [2019] CLJU 51; [2019] 1 LNS 51; [2019] MLJU 35 and *AMEC Capital Projects Ltd v. Whitefriars City Estates Ltd* [2004] EWCA Civ 1418).

[68] The law reports are replete with cases which have elucidated on the principles of natural justice as envisaged in s. 15(b) of the CIPAA and the application of these principles in various case scenarios. It is suffice for present purposes to refer to *Cantillon Ltd v. Urvasco Ltd* [2008] BLR 250; *Martego* (FC, *supra*); *ACFM Engineering & Construction Sdn Bhd v. Esstar Vision Sdn Bhd & Another Appeal* [2016] CLJU 1522; [2016] 1 LNS 1522; [2016] MLJU 1776; *Guangxi Dev & Cap Sdn Bhd v. Sycal Bhd & Another Appeal* [2019] 1 CLJ 592; [2018] MLJU 1542; *Ranhill* (*supra*); *Tidalmarine Engineering Sdn Bhd v. Conlay Construction Sdn Bhd & Another Case* [2018] 2 CLJ 376; *Naza Engineering & Construction Sdn Bhd v. SSL Dev Sdn Bhd* [2019] CLJU 2331; [2019] 1 LNS 2331; [2020] 9 MLJ 499; *Kining Exeton Sdn Bhd v. Majlis Perbandaran Kuantan & Another Case* [2020] CLJU 1066; [2020] 1 LNS 1066; [2020] MLJU 659; *Mei He Development Sdn Bhd v. Eosh Industries Sdn Bhd & Another Case* [2021] CLJU 425; [2021] 1 LNS 425; [2021] MLJU 519 and *Cescon Engineers Sdn Bhd v. Pesat Bumi Sdn Bhd & Another Case* [2022] 9 MLJ 79.

[69] The grounds upon which TNB claimed that there has been a breach of the rules of natural justice are:

(i) in respect of category 2 claims, that:

  (a) the adjudicator failed/neglected to apply his mind in assessing the claim and/or properly consider the issues in dispute in making a finding in MRCB's favour in the sum of RM40,898.72;

  (b) as an alternative to (a) above, the adjudicator arrived at his finding on a frolic of his own and the same does not represent or reflect the positions taken by the parties or based on the evidence available; and

  (c) the adjudicator refused TNB's application for leave to submit a rejoinder to address newfound averments raised for the first time in the adjudication reply in respect of the payment process system ('system'); and

(ii) in respect of the category 1 claim for VO No. 1, that the adjudicator failed and/or neglected to apply his mind in assessing the claim and/or properly consider the issues in dispute in making a finding in MRCB's favour in the sum of RM634,230.23.

[70] Each of these grounds are discussed in turn in the ensuing part of this judgment.

First Issue: Whether The Adjudicator Failed/Neglected To Apply His Mind In Assessing The Claim And/Or Properly Consider The Issues In Dispute In Making A Finding In MRCB's Favour In The Sum Of RM40,898.72

[71] Mr K Mohanadass submitted for TNB that there are two distinct and independent claims under category 2 claims *ie*, late issuance claim, and delayed payment claim as evident from the respective submissions of the parties, the adjudicator's assessment of these claims (see paras. 61 to 64 of the AD) and the adjudicator's decision to dismiss the late issuance claim and to allow the delayed payment claim.

[72] However, it was argued that, in determining the delayed payment claim, the adjudicator had referred to, and conflated, the issues and submissions by the parties in respect of the late issuance claim and delayed payment claim when only the issues and arguments relating to the latter are relevant and not the former.

[73] In para. 31 of the adjudication claim, MRCB had prepared two tables to support its assertion that its applications for interim certificates was in compliance with the contractual provisions, namely cls. 30.1 and 30.17 of the CoC and the Appendix to the CoC at preliminary p. 1/45. The two tables are:

(i) "Table B: Tabulation of Submissions of Interim Payment Applications and the Due Date of the Issuance of Interim Certificates" ('Table B'); and

(ii) "Table C: Tabulation of the Due Date of the Payment for Interim Certificates and Late Honouring of Payment' ('Table C').

[74] Clauses 30.1 of the CoC and the Appendix to the CoC at preliminary p. 1/45 are as quoted earlier. Clause 30.17 of the CoC reads:

> If the Employer fails to pay the Contractor the amount due on any certificate (less any Liquidated Damages and set-off which the Employer is expressly entitled to make under the Contract) after the Period of Honouring Certificates, or the Contractor owes a debt or fails to pay any sum due and owing to the Employer within twenty-one (21) Days after receipt of written notification by the Employer of such debt or amount owing, a simple interest based on the Maybank Base Lending Rate plus one (1) percent shall be payable by the defaulting party on such outstanding amount until the date payment is made.

[75] To illustrate his point that, in deciding the delayed payment claim, the adjudicator had referred to Table B rather than Table C, Mr K Mohanadass drew my attention to paras. 62.13, 62.14, 63 and 64 of the AD, where the adjudicator having found the issue of MRCB's entitlement to claim interest on late payment in MRCB's favour, then proceeded to address the issue of quantum of interest. The adjudicator said:

62.13. Claimant has calculated the interest amounts due in table B of the Adjudication Claim, based on the formula that the number of days late is the difference between the date that the payment was received and the date that was 45 days after issue of the certificate of payment by respondent. The interest is calculated based on the BLR rate applied to the number of days late.

62.14. respondent has alleged in its adjudication response that all the dates listed in table B for date of issue of certificate 5, 12, 14, 17, 20, 22, 23, 27, 28, 30, 31 and 32 were incorrect, and that claimant has not included gazetted public holidays into account. I have reviewed table B against the dates of issue of certificate by the Architect recommending payment as follows:

...

63. Respondent's allegation that the dates used for calculation do not match the certificate dates is correct. However, claimant's calculation date in every case is after the issue date of the certificate by the architect, and from inspection of those architects' certificates date stamped by the PMC are the date received by PMC. Using these dates causes no detriment to Respondent, and I find no reason not to accept the dates as basis for calculation.

64. With regards to Respondent's allegation that public holidays have not been taken into account, the only concrete example provided is for Claim No.5, where the public holidays occurred before issue of the certificate. As Respondent has specifically challenged no other Claim on this basis, I find no fault with claimant's calculation for interest in table B with regards to late honouring of payment, which amounts to the sum of RM40,898.72.

[76] I have considered the adjudication claim (in particular Table B and Table C), the adjudication response, the AD and the parties' submissions, including the oral submissions during the hearing (especially Ms Sajitha's submission on the calculation of interest), and I find that TNB's contention that the adjudicator failed to apply his mind in assessing the claim or to properly consider the issues in dispute is misconceived.

[77] As alluded to earlier, the adjudicator dealt with the amount of interest to be awarded to MRCB in paras. 62.13, 62.14, 63 and 64 of the AD. Based on cl. 30.17 read with cl. 30.1 of the CoC and the Appendix to the CoC at preliminary p. 1/45, in order to determine the amount of interest for the delayed payment claim, the adjudicator would first have to decide the date on which simple interest based on the Maybank base lending rate + 1% starts to run.

[78] It is observed that in the payment claim, IPC Nos. 5, 14, 27 and 30 are mentioned in respect of both the late issuance claim and delayed payment claim. The due date for payment of the IPC is 45 days from the issuance of the IPC. The dates of the IPC are listed in Table B. After adding 45 days to

the dates of the IPC and taking into account the public holidays, the due dates for payment of the IPC can be seen in Table C. In this sense, MRCB's counsel rightly submitted that Table B and Table C are inter-related.

[79] In paras. 62.14 and 63 of the AD, the adjudicator addressed TNB's arguments that the details in Table B are incorrect, particularly the dates of the IPC, and MRCB's failure to take into account gazetted holidays (see para. 66(10) of the adjudication response).

[80] However, in the second sentence in para. 634 of the AD, the adjudicator appears to have made a typographical error by referring to "Table B" instead of "Table C" as he found no fault with MRCB's calculation of interest with regards to late honouring of payment, which amounts to RM40,898.72.

[81] In the final analysis, I am unable to accept TNB's submission that limb (b) of s. 15 of the CIPAA is established, on a balance of probabilities, in that the adjudicator had failed to accord procedural fairness or the right to be heard to TNB before the AD was delivered or to appreciate the issues before him as laid down in *Bintai Kindenko Pte Ltd v. Samsung C&T Corp* [2018] 2 SLR 532.

Second Issue: As An Alternative To The Submission In Respect Of The 1st Issue, Whether The Adjudicator Arrived At The Finding On A Frolic Of His Own And The Same Does Not Represent Or Reflect The Positions Taken By The Parties Or Based On The Evidence Available

[82] In response to Table C in the adjudication claim, TNB submitted the payment process flow adopted for the project where MRCB's involvement is required to initiate "service entry" in the system and to create e-invoices. It was alleged that MRCB had delayed in attending to these matters. Hence, but for MRCB's self-induced delay and lateness in attending to the payment process, there is no basis for the delayed payment claim (see para. 72 of the adjudication response).

[83] MRCB retorted that the system is TNB's system and internal process and it is not stable and has maintenance issues as well as other shortcomings as listed in para. 52 of the adjudication reply. In other words, MRCB did not dispute the applicability of the system in the context of the contract or the utilisation of the system, rather its complaints were limited to the reliability of the system and attribution of fault in relation to delay.

[84] The adjudicator found that:

> 62.6. Respondent's arguments on the delays being claimant's fault do not compel me. The payment process system and process have been crafted by Respondent and imposed on the claimant. I could not discern timelines for compliance to the payment process from the evidence submitted by

> Respondent. For example, taking Respondent's example in para. 55.3 above, if a service entry made 20 days after certification was too slow to assure payment, then in what time period should claimant have made the entry? No evidence has been offered to show that these additional timelines were discussed, agreed upon, and incorporated into the Contract, or what alternatives were offered in case the system was unavailable.
>
> 62.7. Further there has been no argument or evidence offered to show that compliance with these payment processes is a contractual obligation of claimant, failure to perform which would allow Respondent to vary its contractual obligations. If the system and process resulted in late payment for whatever reason, it was incumbent on the Respondent to take action to remedy its own process and system to assure contractual compliance.
>
> ...
>
> 62.10. In deciding on this issue, I find the contractual obligations of the Respondent take precedence over the administrative process imposed by Respondent, and the contractual obligations are clear – payment is after the Honouring Period (which in this contract is 45 days) and if not made, then interest is due. Indeed, Respondent has made this point in its adjudication response – "it is submitted that parties must be held to its contractual bargain – as set out in the Contract".

[85] TNB argued that it was never MRCB's case that the system was "imposed on the claimant" or that MRCB disagreed with the process flow or disputed the implementation or adoption of the system in the context of the contract. Rather, MRCB's complaints were in respect of the reliability of the system and attribution of fault, and not as to the applicability of the system in the context of the contract or its utilisation.

[86] It is for these reasons that TNB asserted that the adjudicator had gone on a frolic of his own in arriving at the findings as he did, in contradiction of MRCB's own case and contemporaneous documentation, and without affording TNB the opportunity to address the adjudicator on the specific aspect of "imposition".

[87] In the course of the oral submissions, TNB's counsel had referred to paras. 72 of the adjudication response and 52 of the adjudication reply to support his argument that there is no statement about the imposition of the system on MRCB. However, the averments in these paragraphs must be understood in the context of MRCB's statements beginning with the adjudication claim.

[88] In paras. 29 and 30 of the adjudication claim, MRCB submitted that:

> 29. The methods/procedures of computation and/or calculation for delay of issuing interim certificates and payment in relation to the certificates were agreed from the very onset. During a Kick-Off Meeting for the Main Building Works on 22.08.2017, in items 6.3.2 and 6.3.3, it was agreed that:

A "... consultant team to evaluate and certified (to owner) within 21 days" and "period to honour payment certificate 45 days"

...

30. The claimant asserts that there is no agreement between the Parties to waive the 21 days computation for issuance of payment certificate as set out in the Contract. In all instances, the Respondent and/or the PMC and/or the Consultants do not have the power the vary the terms and/or conditions of the Contract in the absence the claimant's agreement to the same. Therefore, the Respondent's deliberate intention to delay the issuance of interim certificates and/or make necessary payment is a manifestation of a breach of contract.

[89] From the above excerpt, MRCB clearly took the position that the process of evaluation, certification and payment of the IPC have been agreed upon from the beginning whereby, according to cl. 30.17 of the CoC, the period to honour payment of the IPC is 45 days from the date of issuance of the IPC. TNB understood this to be the case (see para. 70 of the adjudication response).

[90] Additionally, MRCB's stance was that, as TNB had intentionally delayed payment of the IPC, TNB had breached the contract.

[91] In my opinion, the adjudicator's finding that "the payment process system and process have been crafted by respondent and imposed on the claimant" reflects MRCB's averment that the system "... is the respondent's internal process and its own system".

[92] Further, the adjudicator's analysis and findings in paras. 62.6, 62.7 and 62.10 of the AD show that what was foremost in the mind of the adjudicator was the contractual timelines as expressly provided, and agreed to by the parties, in the CoC and Appendix to the CoC at preliminary p. 1/45. In short, the contract prevails. These are all well within MRCB's submissions in the adjudication proceedings.

[93] TNB's allegation that the adjudicator had gone on a frolic of his own in arriving at his findings and conclusions is simply unsubstantiated. Even assuming that the adjudicator had given undue weight to any piece of evidence, the court cannot set aside the AD merely on this ground (see *Naza Engineering* (*supra*, at para. 14), which was quoted in para. 24 of the decision in *MRCB Builders Sdn Bhd v. Wazam Ventures Sdn Bhd & Another Case* [2020] CLJU 145; [2020] 1 LNS 145; [2020] 5 MLRH 138, and the decisions of this court in *JEKS Engineering Sdn Bhd v. PALI PTP Sdn Bhd & Another Case* [2021] CLJU 1406; [2021] 1 LNS 1406; [2022] 9 MLJ 541 at para. 57 and *Wabina Constructions & Engineering Sdn Bhd v. Fulloop Sdn Bhd & Other Cases* [2022] CLJU 2608; [2022] 1 LNS 2608; [2022] MLJU 2744 at para. 61).

Third Issue: Whether There Is A Denial Of Natural Justice When The Adjudicator Refused TNB's Application For Leave To Submit A Rejoinder To Address Newfound Averments Raised For The First Time In The Adjudication Reply In Respect Of The System

[94] TNB contended that MRCB's grievances in para. 52 of the adjudication reply are new issues and arguments which were not raised in the adjudication claim and TNB must be given the opportunity to address these issues as a matter of fairness and justice.

[95] TNB requested the adjudicator to exercise his powers under s. 25(j) of the CIPAA to allow it to submit a rejoinder within five working days from any direction to attend to the filing of the rejoinder which is to be limited to ten pages (see TNB's solicitor's letter to the adjudicator dated 16 June 2022).

[96] The adjudicator made the following observations and directions in respect of the said request:

> 7. At this juncture, Respondent's request is declined. However, I request Respondent to submit on the general issue of new claims raised in an adjudication reply, specifically whether such claims are allowed under the CIPAA, if not why not, and if so, whether the raising of such claims should give rise to a right of reply by a Respondent. This submission should be supported by reference to the law (in particular the CIPAA) and by legal precedent.
>
> 8. Respondent is required to make this submission within 5 working days of receipt of this email, subsequent to which claimant will have 5 working days to offer a reply to the submission should claimant so desire.
>
> 9. Subsequent to receipt and evaluation of submissions I will decide on whether to accept Respondents request to make a rejoinder to the adjudication reply for claims not previously raised and the timeline for such rejoinder.

(see the adjudicator's email to the parties dated 17 June 2022).

[97] By the next email to the parties dated 24 June 2022 regarding order for directions #3, the adjudicator confirmed receipt of the parties' submissions as per order for directions #2 and reminded that each party has five working days to respond to the submission if desired. The adjudicator also requested TNB to confirm that the items listed in para. 15 of its written submissions dated 24 June 2022 constitute a complete list of items to which TNB seeks to issue a rejoinder. If it is not a complete list, the adjudicator directed TNB to issue a comprehensive list by 29 June 2022.

[98] On 29 June 2022, TNB's solicitors wrote a letter to the adjudicator setting out nine items to which a rejoinder is necessary, one of which pertains to para. 52 of the adjudication reply.

[99] The adjudicator dismissed TNB's request as part of order for directions #4 dated 28 July 2022. His reasons for doing so were explained in the AD as follows:

> 57.1. Respondent has provided no compelling reason or support by precedent as to why a rejoinder should be permitted. That the power to allow a rejoinder lies with the adjudicator is not in dispute. But the circumstances under which an adjudicator should feel compelled to exercise that power is unclear and has no compelling supporting precedent.
>
> 57.2. On the other hand, claimant has provided sufficient evidence that an adjudicator not agreeing to a rejoinder or similar rebuttals after the submission of the adjudication reply does not prejudice the Adjudication Matter and has provided precedent to support the position.
>
> 57.3. Further, having evaluated the letter from Respondent of 29 Jun. 2022 on the specific items to which respondent wishes to reply, I have found that either the items were not significant in my arriving to my adjudication decision, or were reasonable replies by claimant to the adjudication response. As such any rejoinder is unnecessary.

[100] Despite the reasoning in para. 57.3 of the AD, TNB contended that it contradicts the adjudicator's findings in paras. 62.5, 62.6 and 62.7 of the AD when he discussed the issue as to whether interest is payable if interim payments are made late, and if so, what should the quantum be. Paragraphs 62.6 and 62.7 of the AD have been cited previously. Paragraph 62.5 reads:

> 62.5. claimant in its adjudication reply denies respondent's allegations on the delays of payment being claimant's fault and alleges that the respondents system was unstable, frequently broke down and had various limitations on entry of payments exceeding the Contract sum.

[101] It was vehemently submitted by TNB's counsel that the adjudication reply must be confined to matters or issues raised in the adjudication response and the adjudication reply is not an avenue for MRCB to present new material argument or evidence which was not previously raised in the adjudication claim (see *Law and Practice of Construction Law in Malaysia*, Sweet & Maxwell, 2021 by Lim Chong Fong (now JCA) at pp. 477 and 478).

[102] Furthermore, the application to file a rejoinder was made promptly and TNB had proposed to limit any such rejoinder to ten pages only. This underscores the genuineness and reasonableness of the request. However, the adjudicator denied TNB the opportunity to be heard in respect of issues and attribution of fault regarding the system when these matters, as eventually revealed in the AD, were central to the adjudicator's findings.

[103] TNB averred that, had it been given the opportunity to submit a rejoinder, it would have pointed out that MRCB's complaints are bare averments and no supporting evidence had been put forth to substantiate the

position taken. Further, TNB would have set out its version of events, explanation and evidence regarding the reliability of the system; rebutted the allegations raised by MRCB regarding the issues allegedly plaguing the system that supposedly prevented MRCB from advancing the necessary submissions or to take the necessary steps to progress processing of the payments; set out alternatives that were made available to MRCB if the allegations are true; and provided an explanation and contemporaneous evidence to demonstrate the conduct of the parties and response in attending to, and progressing, the processing of the payments.

[104] In short, TNB submitted that, had these matters been properly considered, it would have a material impact on the adjudicator's decision. TNB acknowledged that whilst the adjudicator retains the discretion to allow the filing of a rejoinder under s. 25 of the CIPAA, such discretion must be exercised in accordance with the rules of natural justice and fairly, within the limitations imposed by the CIPAA (see *Glencot Development And Design Co Ltd v. Ben Barrett & Son (Contractors) Ltd* 80 Con LR 14 at para. 20; *Guangxi Dev & Cap* (*supra*, at paras. 27 and 28) and *Kining Exeton* (*supra*, at paras. 51 and 63 to 65)).

[105] I have duly considered the parties' submissions in relation to this issue, and I am inclined to agree with MRCB that there is no denial of the rules of natural justice for the following reasons:

(i) the CIPAA does not expressly provide that a respondent in an adjudication has a right to file a rejoinder. In *MRCB Builders Sdn Bhd v. Wazam Ventures Sdn Bhd & Another Case* (*supra*, at para. 13), Wong Kian Kheong J (now JCA) expressed His Lordship's views on the absence of such right, including that, once a respondent is allowed to file a rejoinder, there may well be further response or reply and this would protract the adjudication process and increase costs, contrary to the objective of the CIPAA (see too, *Integral Acres Sdn Bhd v. BCEG International (M) Sdn Bhd & Other Cases* [2021] CLJU 1620; [2021] 1 LNS 1620 at para. 32);

(ii) the adjudicator had given the opportunity to TNB to make written submissions to justify its allegation that there are new issues which have been raised for the first time in the adjudication reply and the need for a rejoinder. MRCB had also filed its reply submission to oppose TNB's application for rejoinder. The adjudicator had duly considered these submissions, including para. 15(2) in TNB's written submissions where the allegations regarding the system are discussed and decided to reject TNB's application with reasons. I echo the view of the court in *MRCB Builders Sdn Bhd v. Wazam Ventures Sdn Bhd & Another Case* (*supra*, at para. 20) that "... when an adjudicator complies with s. 12(2)(a) of the CIPAA and exercises his or her discretion under s. 25(a) and (j) of the

CIPAA to refuse an application by a respondent in an adjudication to file a rejoinder, this does not in itself amount to a breach of the second rule within the meaning of ss. 15(b) and 24(c) of the CIPAA."; and

(iii) even though the adjudicator referred to para. 52 of the adjudication reply in para. 62.5 of the AD, his finding that MRCB is entitled to claim interest on late payments in accordance with cl. 30.17 of the CoC is not premised on the functionality or reliability of the system. TNB itself acknowledged this (see TNB's submission in relation to the second issue above).

The adjudicator's reasoning as seen in paras. 62.6 and 62.7 of the AD (apart from paras. 62.8 and 62.9 on the issues of MRCB's lack of notice to TNB that MRCB intends to claim for interest on late payments and estoppel by conduct) relate to TNB's allegation in the adjudication response of delay on MRCB's part in initiating "service entry" in the system and there being no evidence of any agreement by the parties on the time period within which MRCB must make the "service entry" in the system. To the adjudicator, TNB's contractual obligations take precedence over the administrative process imposed by itself. He found that the contractual obligations as set out in cl. 30.17 of the CoC are clear *ie*, "payment is after the honouring period (which in this contract is 45 days) and if not made, then interest is due" and TNB must be held to the bargain that it had made (see para. 62.10 of the AD).

Fourth Issue: In Respect Of The Category 1 Claim For VO No. 1 On Piles And Pile Caps, Whether There Is A Denial Of Natural Justice When The Adjudicator Failed And/Or Neglected To Apply His Mind In Assessing This Claim And/Or Properly Consider The Issues In Dispute In Making A Finding In MRCB's Favour In The Sum Of RM634,230.23

[106] TNB submitted that, based on the payment claim and adjudication claim, there are two distinct and independent claims under this head of claim, namely:

(i) remeasurement for piling and pile caps works in the sum of RM178,493.84 ('remeasurement claim', see paras. 38 to 44 of the adjudication claim); and

(ii) claims for piling and pile caps works which were completed by MRCB pursuant to PMI-Plc-003 dated 23 October 2017, PMI-Plc-009 dated 29 January 2018, PMI-Plc-011 dated 21 February 2018, PMI-Plc-013 dated 13 March 2018 and PMI-Plc-017 dated 6 April 2018 in the sum of RM634,230.23 ('VO claim', see paras. 45 to 72 of the adjudication claim).

The total claim amount in respect of VO No. 1 is thus RM812,724.07.

[107] Akin to the first issue, it was further submitted that the parties had addressed the remeasurement claim and the VO claim separately in the adjudication claim (paras. 38 to 44 and 45 to 72, respectively), adjudication response (paras. 82 to 85 and 86 to 93, respectively) and adjudication reply (paras. 54 to 61 and 62 to 68, respectively). However, unlike the Category 2 claims, the adjudicator did not assess the remeasurement claim and the VO claim individually.

[108] Instead, the adjudicator is said to have mistakenly proceeded to evaluate VO No. 1 on the basis that the remeasurement claim and the VO claim are one and the same. To exemplify this point of argument, TNB's counsel highlighted the following:

(i) paragraph 74 of the AD reflects the remeasurement claim, whilst para. 75 of the AD reflects the VO claim;

(ii) the adjudicator had referred to or conflated the issues and arguments raised by TNB and MRCB in respect of the remeasurement claim and the VO claim in making his findings in respect of the VO claim (see for example, (a) paras. 80 and 81 of the AD where TNB's arguments therein are in respect of the remeasurement claim as can be seen in paras. 83 to 85 of the adjudication response; and (b) para. 91 of the AD which is in respect of the remeasurement claim as can be seen at sub-para. 148(1)(g) of the adjudication response); and

(iii) there is no determination in the AD in respect of the remeasurement claim. Rather, the issues and arguments raised by TNB and MRCB in respect of the remeasurement claim form, amongst others, the adjudicator's findings in respect of the VO claim when these were not relevant, material or represent the positions taken by parties.

[109] Hence, TNB contended that the adjudicator failed to apply his mind in assessing VO No. 1 on piles and pile Caps or to properly consider the issues in dispute in making a finding in MRCB's favour, including TNB's defences in the context of the VO claim (see paras. 76 to 93 of the adjudication response). Had these defences been properly considered and resolved, it would have a material impact on the outcome of the adjudication.

[110] Upon perusal of the AD, it is apparent that the adjudicator was aware that MRCB's claim in respect of VO No. 1 is made up of the remeasurement claim and the VO claim (see paras. 74 and 75 of the AD) and he decided to dismiss the former and to allow the latter.

[111] It is true that the adjudicator did not assess the remeasurement claim and the VO claim individually and TNB's complaint in this regard was that the adjudicator failed to properly consider its defences to the VO claim.

[112] According to para. 86 in the adjudication response, the issue in dispute is MRCB's "... entitlement to claim in terms of scope, the application of the valuation rules to be adopted pursuant to cl. 11.6 of the CoC *eg*, rates to be adopted, are the applicable rates provided and available as part of the contract or market rates ought to be applied *etc*, as well as reasonableness of the claimant's claim." It is apparent upon perusal of paras. 79 to 93 of the AD that the adjudicator had addressed these very issues by considering the parties' submissions on the same.

[113] Whilst the adjudicator may not have made an express finding on each submission made by the parties, this is not a ground to say that he has breached the rules of natural justice (see *Integral Acres* (*supra*, at para. 31)).

[114] In the final analysis, TNB's allegation is nothing more than an attempt to revisit the merits of the AD.

OS No. 166: The Stay Application

[115] TNB applied for the AD to be stayed pending the disposal of the stay application, the setting aside application and/or the final determination of the subject matter of the AD by way of arbitration.

[116] The CIPAA provides for stay of an adjudication decision in the following terms:

> 16. (1) A party may apply to the High Court for a stay of an adjudication decision in the following circumstances:
>
> (a) an application to set aside the adjudication decision under s. 15 has been made; or
>
> (b) the subject matter of the adjudication decision is pending final determination by arbitration or the court.
>
> (2) The High Court may grant a stay of the adjudication decision or order the adjudicated amount or part of it to be deposited with the Director of the KLRCA or make any other order as it thinks fit.

[117] TNB has met the threshold requirements in paras. 16(1)(a) and (b) of the CIPAA, however this *per se* is not sufficient for the court to make an order as sought by TNB (see *Subang Skypark Sdn Bhd v. Arcradius Sdn Bhd* [2015] 10 CLJ 801 at paras. 27 and 28; *Pasukhas Sdn Bhd v. Empire Multiple Sdn Bhd & Another Case* [2019] CLJU 757; [2019] 1 LNS 757 at paras. 151 to 155 and 159; *Punj Lloyd Sdn Bhd v. Ramo Industries Sdn Bhd & Anor And Another Case* [2019] 6 CLJ 250 at paras. 120 to 123 and *Genbina Sdn Bhd v. Bina Puri Construction Sdn Bhd & Another Case* [2019] CLJU 1980; [2019] 1 LNS 1980; [2019] MLJU 1933). TNB must establish that there are clear and unequivocal errors in the AD or that the justice of the case warrants a stay of the enforcement of the AD (see *View Esteem* (*supra*, at paras. 79 and 82, pp. 509 and 511).

[118] In *Zeta Letrik Sdn Bhd v. JAKS Sdn Bhd & Other Cases* [2022] CLJU 2569; [2022] 1 LNS 2569; [2022] MLJU 2734, this court said:

> [64] Among the cases which have discussed how the tests of clear and unequivocal errors and justice of the case are to be applied in the exercise of the discretion of the court whether to grant a stay or otherwise are *EA Technique (M) Sdn Bhd v. Malaysia Marine And Heavy Engineering Sdn Bhd* [2020] 1 LNS 1851; *Maju Holdings Sdn Bhd v. Spring Energy Sdn Bhd* [2020] 1 LNS 1194 and [2021] 1 LNS 367; *Pinnacle Supreme Sdn Bhd v. DSG Projects Malaysia Sdn Bhd* [2021] 1 LNS 852; *Sun Plaza Development Sdn Bhd v. Hejingkang Sdn Bhd* [2021] 1 LNS 629 and *CRCC Malaysia Bhd v. M101 Entity Sdn Bhd and other cases* [2021] MLJU 1305.
>
> [65] In *CRCC Malaysia* (*supra*), this court said:
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> > [56] In *Maju Holdings Sdn Bhd v. Spring Energy Sdn Bhd and other cases* [2020] 7 AMR 147 at p 153, the High Court stated as follows as regards the *View Esteem* case:
> >
> > > [17] Clear error has not been defined. Obviously, it is fact sensitive depending on the circumstances of each case as to how the adjudicator reasoned his findings in the adjudication decision. In my view, the error must be so grave that it pricks my conscience if I left it unrectified. In a way, it is subjectively objective.
> >
> > [57] As for the phrase "to meet the justice of the individual case", this Court in *Genbina Sdn Bhd v. Bina Puri Construction Sdn Bhd And Another Appeal* [2020] 2 MLRH 101 at p. 111 said that the determination as to what is right and fair must necessarily be dependent on the factual matrix and circumstances arising in each case whilst in *EA Technique (M) Sdn Bhd v. Malaysia Marine and Heavy Engineering Sdn Bhd* [2021] 1 AMR 594 at p 603, Lim Chong Fong J expressed the following view:
> >
> > > [27] Furthermore in the *View Esteem* case, it is also stated that the financial status is not the sole factor in determining the grant of the stay. The stay may be allowed to meet the justice of the individual case aside from clear error. They seem to be disjunctive as explained in the Leap Modulation case. Justice of the case is of course even more subjectively objective. It involves the exercise of discretion. However in light of the caveat of caution mentioned in the *View Esteem* case, I am also only minded to grant the stay if my conscience is pricked in the special circumstances of the case. Beyond that, it is incapable of definition or illustration.
> >
> > [28] The bottom line is that considerations of both clear error as well as justice of the individual case to justify the stay of an adjudication decision have to be stringently applied as this would otherwise defeat the statutory intent of the CIPAA to ensure cash flow in the construction industry; see *Subang Skypark Sdn Bhd v. Arcradius Sdn Bhd* [2015] 1 CLJ 801.

[119] In the instant case, it makes no difference that MRCB itself resorted to a lengthier dispute resolution process *ie*, arbitration at first instance. As discussed under the first ground, sub-s. 37(1) of the CIPAA allows for concurrency of three modes of dispute resolution. I am unable to accept TNB's submission that final determination of the disputes by way of arbitration is imminent as it will take some time before the arbitral tribunal delivers the award. Moreover, this would have the effect of depleting the AD of its efficacy and be contrary to the purpose of the CIPAA for speedy resolution of construction disputes. If there is any prejudice, it would be to MRCB who is deprived of the fruits of the adjudication.

[120] TNB's contention that the AD contains clear and unequivocal errors is principally premised on the first issue to the fourth issue under the third ground above, this time couched as mistakes in the adjudicator's findings and conclusions. These issues have been extensively addressed in the preceding part of this judgment and I have given my reasons for rejecting TNB's arguments. I am neither convinced that TNB has proven, on a balance of probabilities, that there are clear and unequivocal errors in the AD as claimed.

[121] In addition, TNB relied on the following grounds in submitting that there are clear and unequivocal errors in the AD:

The AD contains findings and/or application of legal principles that are in conflict with judicial precedents in Malaysia relating to the discharge of burden of proof and the requirement to prove loss.

(i) discharge of burden of proof

As alluded to previously, in relation to the delayed payment claim, the parties have differing views on what caused or contributed to delays to payments for the IPC. The burden is on MRCB to demonstrate that, but for TNB's conduct, delay would not have arisen. The burden only shifts to TNB to establish its defence in relation to the system after the adjudicator is satisfied that TNB is responsible for the delay. The adjudicator did not follow the law relating to discharge of the burden proof as he did not consider whether TNB is the cause of delay based on the evidence presented by MRCB. Instead, at paras. 62.6 and 62.7 of the AD, he proceeded to focus on TNB's obligations to set forth evidence and arguments in relation to the system.

In my considered view, there is no merit to TNB's submission above because, as explained earlier, the adjudicator's paramount consideration was on the contractual obligations, especially under cl. 30.17 of the CoC. The adjudicator's reasoning was well within the matters which were submitted by MRCB in the adjudication claim (see the discussion

under the third ground – second issue for the setting aside application). By allowing MRCB's delayed payment claim, the adjudicator must have been satisfied that, overall, MRCB had discharged the burden of proof.

With regards to the claim for VO No. 1 on Piles and Pilecaps, TNB contended that the adjudicator failed to understand the case which MRCB had to meet. At para. 89 of the AD, the adjudicator stated that "As I have found claimant has submitted a valid claim per the COC, it is incumbent on respondent to demonstrate to me that respondent had valid and cogent reasons for denying any part of the claim.". The issue in dispute between the parties in respect of the VO claim was whether the claim was reasonable and in accordance with contractual provisions in terms of quantum rather than whether the PMIs amount to variation under the contract.

Again, applying the law on discharge of the burden of proof, TNB argued that MRCB is required to prove quantum and after the adjudicator finds that this is established, then the burden shifts to TNB to disprove the same. In paras. 90 and 92 of the AD, the adjudicator's focus was on TNB's assessment of the VO claim as opposed to MRCB demonstrating, among others, why it says it is entitled to the amount as claimed. Hence, TNB alleged that the adjudicator did not consider whether MRCB's quantum was established based on the case or evidence presented by MRCB.

With respect, I disagree with TNB's contentions. As has been repeatedly emphasised in many judgments on applications under the CIPAA, whilst a party may choose to rely on selective parts in an adjudication decision (or the adjudication papers for that matter), the court must be vigilant and read the AD in its entirety.

In this case, paras. 73 to 94 are the critical part of the AD. As can be seen in paras. 73 and 84 of the AD, the adjudicator had framed the issue as whether VO No. 1 is a valid VO under the contract and what should the quantum of the VO be. Further, in para. 79 of the AD, apart from the value of the alleged claim, the adjudicator stated TNB's arguments which include, among others, whether the claim falls within cl. 11 of the CoC and can be regarded as a variation (see too, among others, paras. 79 to 81 of the adjudication response). A perusal of paras. 85 to 94 of the AD shows that the adjudicator had addressed the parties' submissions on the issue as he had framed.

On the issue of quantum, the adjudicator found that MRCB had submitted "detailed cost proposals and justifications", including the bills of quantity and supporting technical documents, in the adjudication claim. The adjudicator did not agree with TNB that there is no basis for

MRCB's claim and it lacks specificity (see paras. 87 and 88 of the AD). Ultimately, the adjudicator was satisfied that MRCB has proven its case both on liability and quantum (paras. 93 and 94 of the AD).

(ii) the requirement to prove loss

The alleged error again relates to the claim for VO No. 1 on piles and pilecaps whereupon TNB submitted, in reliance of the case authorities of *Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd* [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635; [1989] 3 MLJ 360 at p. 367 and *Tekun Nasional v. Plenitude Drive (M) Sdn Bhd & Another Appeal* [2021] 10 CLJ 206; [2021] 6 MLJ 619 at para. 66, that a party claiming substantial damages must prove both the fact, and amount of loss. However, the adjudicator did not make any finding in the AD that MRCB's quantum of loss is proven as a matter of law.

My reasoning that paras. 73 to 94 of the AD must be read as a whole similarly applies here. Even though the adjudicator did not express his findings in a manner as desired by TNB, it can be safely concluded that, having considered all the evidence, the adjudicator was satisfied that MRCB had proven the basis of its claim and the quantum.

[122] In the final analysis, there are no clear errors in the AD that would "prick the conscience of this court if left unrectified" such as to warrant a stay of the AD.

[123] Moving on to TNB's case that the AD should be stayed to meet the justice of this case, it was submitted that:

(i) the CIPAA proceeding was initiated as a mechanism to exert severe litigation pressure on TNB and not to alleviate cash flow problems or for reasons consistent with the intention of Parliament in enacting the CIPAA and as such amounts to an abuse of process;

(ii) TNB would suffer more harm resulting from the refusal of stay than the potential harm, if any, against MRCB as this is not a case of an impecunious construction contractor or one in a poor financial situation that has not been paid at all by the employer. Nor is this a case where MRCB is at risk of not getting any payment following the arbitration; and

(iii) TNB is financially capable of depositing any such sum as may be ordered by this court in respect of the AD, if required by the court.

[124] I have considered TNB's submissions above, but I am not moved to agree that the justice of this case justifies an order to stay the AD. MRCB acted well with its right to initiate adjudication proceedings even if it is after the commencement of arbitration. MRCB has been deprived of its rightful

claims since the issuance of the certificate of practical completion. TNB should comply with the AD and allow the disputes between the parties to be conclusively resolved in the arbitration.

[125] To conclude, TNB has not established that there are clear errors in the AD or that a stay is justified to meet the justice of the case.

OS No. 167: The Enforcement Application

[126] Following from my decision in respect of the setting aside application and the stay application to dismiss both applications, and that MRCB has established the elements for an order to be made as sought, namely:

(i) there is an AD that has been rendered in MRCB's favour and there has been non-payment of the adjudicated sum by the date specified in the AD;

(ii) there is no prohibition to the grant of the order sought in the enforcement application since the setting aside application and stay application are dismissed; and

(iii) there is no written settlement of the subject matter between the parties and nor is there any final decision rendered on the payment claim, whether made in arbitration or by the court as at the date of the hearing and decision of the enforcement application

(see *Inai Kiara Sdn Bhd v. Puteri Nusantara Sdn Bhd* [2019] 2 CLJ 229; [2019] 2 MLJ 362 and the subsequent cases which have applied the legal principles as expounded therein), it is a foregone conclusion that MRCB's application to enforce the AD as if it is a judgment or order of the High Court pursuant to sub-s. 28(1) of the CIPAA must be allowed.

Conclusion

[127] Based on all the above said considerations, the setting aside application and the stay application in OS No. 165 and OS No. 166 were dismissed with costs of RM12,000 and RM5,000, respectively. The enforcement application in OS No. 167 was allowed with costs of RM3,000. All orders made as to costs are subject to the standard allocatur fees.